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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. [redacted] 1099

BANGOR AND AROOSTOOK RAILROAD COMPANY, ET AL., *Petitioners,*

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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No.

BANGOR AND AROOSTOOK RAILROAD COMPANY, ET AL., *Petitioners,*

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioners pray that a writ of certiorari issue to review an order of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on February 28, 1969.

Opinions Below

The opinion of the District Court, delivered orally on May 28, 1968 and not officially reported, is set forth in Appendix A hereto. The February 28, 1969 opinion of the Court of Appeals, not yet officially reported, is set forth in Appendix B hereto.

Jurisdiction

The order of the Court of Appeals, set forth in Appendix C hereto, was entered on February 28, 1969. A timely peti-

tion for rehearing was denied on October 23, 1969, in an order set forth in Appendix D hereto.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Is Section 8 of the Norris-LaGuardia Act applicable to a proceeding for an order temporarily restraining a strike allegedly in violation of the Railway Labor Act pending a hearing on a motion for preliminary injunction?

2. Assuming that the District Court erred in holding that Section 8 of the Norris-LaGuardia Act is inapplicable to such a proceeding for a temporary restraining order and, therefore, in not hearing evidence concerning compliance with Section 8 or determining whether a temporary restraining order should be issued under the circumstances despite noncompliance with Section 8, does such error prevent persons damaged by strikes in contemptuous violation of the temporary restraining order issued by the District Court from recovering their damages in a compensatory contempt proceeding?

Statute Involved

Section 8 of the Norris-LaGuardia Act, 47 Stat. 72, 29 U.S.C. § 108, provides that:

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

[1] That order also disposed of certain other matters pending in the same dockets before the Court of Appeals which are not involved in this petition.

Statement of the Case

When steam-powered locomotives were replaced by diesels, the primary function of the locomotive firemen—firing the boilers—disappeared and such firemen generally were not needed for the safe and efficient operation of locomotives. Nevertheless, the collective bargaining agreements between the petitioner railroads and the respondent union continued to require that a fireman be used on most locomotives, at great cost to petitioners and ultimately to the public in the form of higher rates. In an effort to eliminate the wasteful overmanning resulting from that requirement and other obsolete work rules, petitioners in 1959 served respondent and other unions representing their operating employees with notice of proposals, pursuant to Section 6 of the Railway Labor Act (45 U.S.C. § 156), to change the existing agreements so as to do away with those work rules.[2]

The dispute resulting from those proposals and from counterproposals served by the unions was submitted to an *ad hoc* Presidential Railroad Commission for its investigation and recommendation. That Commission concluded that firemen generally are not needed for the safe and efficient operation of locomotives in freight and yard service, and recommended the abolition of rules requiring that firemen be so used (subject to certain protections for existing firemen), as did an emergency board appointed by the President pursuant to Section 10 of the Railway Labor Act (45 U.S.C. § 160). Although accepted by the railroads, the recommendations of the Commission and emergency board were rejected by the unions and all of the procedures of the Railway Labor Act applicable to a major dispute were exhausted without settling the dispute.[3] When the unions threatened

[2] The validity of those Section 6 proposals was upheld by this Court in *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963).

[3] Disputes over Section 6 proposals to change existing agreements commonly

a nationwide railroad strike, the Congress enacted Public Law 88-108 (77 Stat. 132) to prevent that disaster.

Under P.L. 88-108, the two most difficult issues in dispute —the issue as to the use of firemen and an issue as to the consist of train crews (*e.g.*, the number of brakemen to be used)—were submitted to compulsory arbitration by an arbitration board which was designated as Arbitration Board No. 282. Board 282 agreed with the Presidential Railroad Commission "that firemen-helpers are not so essential for the safe and efficient operation of road freight and yard diesels that there should continue to be either a national rule or local rules requiring their assignment on all such diesels." *Opinion of Neutral Members*, 41 Labor Arbitration 680, 688 (1963). In general, its Award modified the existing agreements and established new work rules whereby the use of firemen in freight and yard service could be reduced by approximately 90%, subject to certain protections for the existing firemen. The Award also established procedures whereby train crew consists could be reduced subject to protections for existing employees.[4]

Section 3 of P.L. 88-108 provided that the arbitration award should constitute "a complete and final disposition" of the issues submitted to arbitration. Section 4 provided, however, that the "award shall continue in force for such

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are referred to as "major" disputes in contrast to disputes over the interpretation or application of existing agreements which commonly are referred to as "minor" disputes. Minor disputes not settled by agreement are subject to compulsory arbitration by adjustment boards under Section 3 of the Act, 45 U.S.C. § 153, and a union may not validly strike over such disputes. *E.g., Locomotive Engrs.* v. *L. & N. R. Co.*, 373 U.S. 33 (1963). In major disputes, resort to self help such as strikes by the unions and lockouts by the carriers is permitted, but only after the exhaustion of procedures that "are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966). See, *e.g., Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378 (1969), where those procedures are succinctly described.

[4] The validity of the Award was upheld in *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D.D.C., 1964), aff'd *per curiam*, 331 F.2d 1020 (D.C. Cir., 1964), cert. den., 377 U.S. 918 (1964).

period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise." Board 282 provided that its Award should continue in force for a period of two years from the effective date thereof, unless the parties agreed otherwise. This two-year period expired as of January 25, 1966 insofar as the crew-consist provisions of the Award were concerned and expired as of March 31, 1966 insofar as the fireman provisions of the Award were concerned.

A controversy arose between the railroads and the unions (except for the Brotherhood of Locomotive Engineers, which agreed with the position of the railroads) concerning the rules that would apply following expiration of the two-year period of the Award. In general, the railroads contended that their prior rules as modified under the Award would continue to apply until changed in accordance with the Railroad Labor Act, while the unions contended that the prior rules would automatically be restored to full force and effect and apply after expiration of the Award until changed in accordance with the Railway Labor Act. A separate, although related, controversy arose between the railroads and three of the unions—respondent, the Brotherhood of Railroad Trainmen ("BRT"), and the Order of Railway Conductors & Brakemen ("ORC&B")—as a result of proposals served by those unions while the Award was still in effect, purportedly pursuant to Section 6 of the Railway Labor Act, to adopt new work rules that in effect would have wiped out the reductions in overmanning that had been accomplished under the Award. In general, the carriers contended that such proposals were premature in that they could not validly be served until the two-year period of the Award expired, while the unions contended that they had a right to serve and bargain about such proposals during the period of the Award as well as thereafter.

These controversies first came before the courts in litigation brought by the railroads against the crew-consist unions, as the crew-consist provisions of the Award were the first to expire. With minor exceptions, the District Court upheld the position of the railroads in regard both to the rules in effect following expiration of the Award and to the prematurity of the Section 6 notices served during the period of the Award. *Akron & Barberton Belt R. Co.* v. *Brotherhood of R. Trainmen*, 250 F. Supp. 691 (D. D.C., 1966), supplemental opinions, 252 F. Supp. 207 (D. D.C., 1966), 253 F. Supp. 538 (D. D.C., 1966), 254 F. Supp. 306 (D. D.C., 1966). Similar rulings were made by the District Court in the subsequent litigation between petitioners and respondent following expiration of the fireman provisions of the Award. *Bangor and Aroostook R. Co.* v. *Brotherhood of Loc. F. & E.*, 253 F. Supp. 682 (D. D.C., 1966).

While the carriers sought and obtained temporary restraining orders against strikes by the crew-consist unions over the rules to be applied following expiration of the Award, those unions soon made clear that they did not intend to strike and the temporary restraining orders were allowed to expire without any further injunctive relief being sought or granted. On March 28, 1966, the District Court issued an order temporarily restraining respondent and its officers, among others, from striking "over any dispute as to the agreements, rules, regulations, interpretations, or practices to be applied by the plaintiffs or any of them upon the expiration of the period during which the Award by Arbitration Board No. 282 shall continue in force as an award," pending an April 4, 1966 hearing on the plaintiff railroads' motion for a preliminary injunction. That temporary restraining order was issued upon the basis of affidavits setting forth threats by top officers of respondent to strike if the prior rules were not restored to full force and effect when the fireman provisions of the Award expired.

Unlike the crew-consist unions, respondent did not deny that it intended to strike and it soon demonstrated that its threats were not idle. In the teeth of the temporary restraining order, respondent struck several of the railroads immediately after the fireman provisions of the Award expired at 12:01 A.M. on March 31, 1966.[5] Later that day, the District Court entered a Supplement to Temporary Restraining Order in which respondent and "all other persons" subject to the March 28, 1966 order were specifically "ordered to cease the said strikes and picketing that are now taking place," but respondent nevertheless continued its illegal strikes in direct violation of that order. Consequently, on April 2, 1966 following a hearing on an order to show cause, the District Court entered an order adjudging that respondent and its President (H. E. Gilbert) "are guilty of contempt of this Court in failing and refusing to comply with this Court's order of March 28, 1966, as supplemented by its order of March 31, 1966," and ordering that respondent "be fined in the sum of $25,000 and H. E. Gilbert be fined in the sum of $2500 if the said contempts have not been terminated by 12 o'clock noon, on April 3, 1966." When respondent continued to defy the District Court and prolonged the strikes beyond noon on April 3, 1966, the District Court issued a rule to show cause as to why the fines should not be increased but the strikes were terminated before action could be taken upon the rule to show cause, after midnight on April 4, 1966.

The parties agreed, with the approval of the District Court, to bypass the preliminary injunction stage and go directly to a final hearing of the merits upon the basis of a

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[5] The struck railroads included the Boston and Maine, the Central of Georgia, the Grand Trunk Western, the Illinois Central, the Missouri Pacific, the New Orleans Union Passenger Terminal, the Pennsylvania, the Portland Terminal, the Seaboard, the Spokane International, the Texas and Pacific, and the Union Pacific.

stipulation as to the facts and issues. Among other things, that stipulation provided that:

> "5. Whether the Norris-LaGuardia Act . . ., or any part thereof, may apply to the dispute involved in this proceeding [is one of the issues to be decided]. The parties contemplate that this issue is to be argued and decided in the trial on May 4, 1966 as a matter of law. If it should be determined that the Norris-LaGuardia Act or some part thereof as a matter of law may apply to the dispute involved in this proceeding, the parties contemplate that a subsequent trial or hearing will be held to determine whether the requirements of the Norris-LaGuardia Act have been complied with upon the basis of the evidence and other relevant circumstances brought before the Court at the subsequent trial or hearing."

In addition to generally agreeing with petitioners' position of the merits (see p. 6, *supra*), the District Court held Norris-LaGuardia in its entirety to be inapplicable (253 F. Supp., at 689) so no further hearing was held to determine whether Section 8 of that Act had been complied with by petitioners.

The judgment on the merits in the case between petitioners and respondent was entered by the District Court on May 12, 1966. Meanwhile, on April 29, 1966, petitioners filed a motion to assess the fines conditionally imposed in the April 2, 1966 contempt order and a motion to award compensatory contempt damages to the railroads that had been struck by respondent. An order assessing the coercive contempt fines was entered on June 15, 1966,[6] and the compensatory contempt proceeding was held in abeyance pending appeals from that order and from the judgment on the merits.

[6] *Bangor and Aroostook R. Co.* v. *Brotherhood of Loc. F. & E.*, 255 F. Supp. 476 (D. D.C., 1966).

While not consolidated, the appeals from the judgment on the merits in the crew consist case, the appeals from the judgment on the merits in the fireman case between petitioners and respondent, and the appeals from the order assessing the coercive contempt fines were argued *seriatim* before a single panel of the Court of Appeals. On May 12, 1967, that Court issued two opinions relating to those appeals. One opinion dealt only with the appeals from the order assessing the coercive contempt fines. It is reported as *Brotherhood of Loc. Fire. & Eng.* v. *Bangor & Aroostook R. Co.*, 380 F.2d 570 (D.C. Cir., 1967), and is referred to herein as the "Coercive Contempt Opinion." The second opinion dealt with the appeals from the judgments on the merits entered in both the crew-consist case and in the fireman case. As supplemented on July 31, 1967, it is reported as *Brotherhood of Railroad Trainmen* v. *Akron & B.B. R. Co.*, 385 F.2d 581 (D.C. Cir., 1967), and is referred to herein as the "Merits Opinion."

In its Coercive Contempt Opinion, the Court of Appeals rejected all attacks upon the coercive contempt fines except one. The exception was a holding that the District Court should have held an evidentiary hearing upon the issue of whether respondent and its president had complied, or were unable to comply, with the condition that the strikes be terminated by noon of April 3, 1966.[7] While remanding the proceeding for such a hearing, the Court of Appeals rejected contentions that the coercive contempt fines could not be assessed because, among other things, the underlying tempo-

[7] Petitioners had filed affidavits asserting that the strikes had not terminated until 12 hours or more after the deadline, and no opposing affidavits were filed. The District Court saw no need under those circumstances for an evidentiary hearing, but the Court of Appeals thought it "possible that counsel for appellant was urging a more absolute 'substantial compliance,' or an inability to comply, with the District Court's unconditional order to call off the strike and return to work," and held that respondent and Mr. Gilbert should be allowed an opportunity to present evidence supporting the assertions of their counsel. 380 F.2d, at 581-582.

rary restraining order violated Sections 4 and 8 of the Norris-LaGuardia Act. After expressing the view that the coercive contempt fines were enforceable even if the underlying restraining order was invalid, the Court stated that such "an analysis is not, however, critical or determinative in the case now before us, because we find that the Norris-LaGuardia Act does not apply to preclude these underlying temporary restraining orders" since that "Act will not apply to preclude injunctive relief in cases in which the acts to be enjoined are in violation of the Railroad Labor Act." 380 F.2, at 483. See, generally, 380 F.2d, at 580, 583-584.

In its Merits Opinion, the Court of Appeals generally affirmed the position of the carriers and the District Court that the work rules established under Award 282 continued to apply until changed in accordance with the Railway Labor Act (385 F.2d, at 587, 592-594, 607-612), but held that the Section 6 notices served during the period of the Award were not premature although certain of those notices were invalid (385 F.2d, at 594-605).[8] In its initial opinion of May 12, 1967, the Court did not discuss the Norris-LaGuardia issue. At the conclusion of that opinion (385 F.2d, at 605), the Court stated that the parties could "request supplemental rulings on any matters that have not been discussed in this opinion." The supplemental opinion of July 31, 1967 resulted from such requests, including requests by two of the crew-consist unions (BRT and ORC&B) that the Court pass upon the validity of the order temporarily restraining strikes by those unions.[9]

The railroads in the crew-consist case took the position

[8] Respondent had served three Section 6 proposals on or about November 15, 1965, identified as Notice No. 1, Notice No. 2 and Notice No. 3. Notice No. 1, which proposed the adoption of rules that once again would require the use of firemen on almost all locomotives, was held to be valid and bargainable, Notice No. 2 was held to be invalid, and issues going to the validity of Notice No. 3 had been stipulated out of the case.

[9] Respondent did not request such a ruling with respect to the temporary restraining order issued against it and had not attacked that order at any time

that any issues as to the validity of the temporary restraining order entered in that case were moot as that order had long since expired, no strikes occurred and no further injunctive relief was issued. The Court held, however, that the possibility of recovery on the bond if the order was erroneously issued prevented mootness, and went on to hold that Section 8 of Norris-LaGuardia was applicable and had not been complied with insofar as the order restrained the BRT although there was no failure to comply with Section 8 insofar as the order restrained the ORC&B.[10] 385 F.2d, at 613-614. According to the Court of Appeals, the decision of this Court in *Trainmen* v. *Chicago, R. & I.R. Co.*, 353 U.S. 30 (1957), established a "principle of accomodation" between Norris-LaGuardia and the Railway Labor Act which was to be applied separately to the various sections of Norris-LaGuardia rather than to the Act as a whole. 385 F.2d, at 613. Under that principle of accommodation as so applied, the Court concluded that Section 8 applies to restraints against violations of the Railway Labor Act even though Section 4 does not. 385 F.2d, at 613-614. But, it "may be that in a particular case the District Court might conclude that the imperatives of the Railway Labor Act override Section 8," and error in entering a restraining order because of non-compliance with Section 8 would not "excuse a contemptuous violation." 385 F.2d, at 614. Nevertheless, "the approach of the District Court . . . that Section 8 of the Norris-LaGuardia Act was completely inapplicable . . . was error." 385 F.2d, at 614.

A petition by respondent and its president for writ of

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in the Merits Case, apparently because the issue was raised in the Coercive Contempt Case.

[10] The distinction in the result as to the two unions apparently stemmed from the Court's holdings in the May 12, 1967 opinion (385 F.2d, at 598-599) that the Section 6 notices served by the BRT were not premature, so that the railroads had a duty to bargain about such notices even during the period of the Award, while the Section 6 notices served by the ORC&B were premature or invalid so that no such duty arose. See 385 F.2d, at 614.

certiorari to review the Coercive Contempt Opinion was denied with a notation that the case "is not yet ripe for review by this Court" in view of the remand of that matter to the District Court for further proceedings. 389 U.S. 327-328 (December 11, 1967). Petitions by both the railroads and the unions to review the Merits Opinion were also denied. 390 U.S. 923 (January 29, 1968).

All of the foregoing is now history, but it forms the background for the decision which we now seek to have reviewed. We have noted (p. 8, *supra*) that petitioners, on April 29, 1966, filed a motion for an award of compensatory contempt damages to the railroads struck by respondent upon expiration of the Award in violation of a temporary restraining order, and that proceedings upon that motion were held in abeyance pending the appeals as to the coercive contempt fines and as to the mertis. On February 5, 1968 respondent filed with the District Court a motion to dismiss the compensatory contempt proceeding on the ground that the ruling by the Court of Appeals in its Merits Opinion that the temporary restraining order against the BRT was erroneously issued also applied to the temporary restraining order issued against respondent. Petitioners pointed out that the Court of Appeals in its Coercive Contempt Opinion had upheld the validity of the temporary restraining order issued against respondent. The District Court, in a brief oral opinion, concluded that the "validity of the restraining order has been upheld" and compensatory damages could be awarded even if it were invalid in view of "the decision of the Supreme Court in the Mine Workers case to the effect that even an invalid injunction must be obeyed and failure to obey it is punishable as a contempt." App. A, at 29. The motion to dismiss the compensatory contempt proceeding was denied, therefore, in an order entered on May 29, 1968.

Respondent then filed with the Court of Appeals, in the dockets in which the Merits Opinion had been rendered, what it denominated as a Petition for Further Relief to Enforce this Court's Prior Opinion and Mandate. The contents of that petition demonstrated that it sought an extraordinary writ under the All-Writs Act, 28 U.S.C. § 1651, mandating the District Court to dismiss the compensatory contempt proceeding. The February 28, 1969 decision of the Court of Appeals, which is the subject of this petition, in effect granted that petition although the Court saw no reason to issue a formal mandate as it was confident that the District Court would proceed in accordance with the views expressed by the Court of Appeals in its opinion. App. B., at 33.

The Court of Appeals characterized its Coercive Contempt Opinion as holding "that a coercive contempt fine could stand even assuming the restraining order itself was beyond the jurisdiction of the District Court by virtue of the Norris-LaGuardia Act" (App. B, at 31), although conceding that "at one point there is general language" in the Opinion "that the Norris-LaGuardia Act did not preclude the restraining order against" respondent (App. B, fn. 3, at 32-33). The Court of Appeals then held that the "lack of propriety of the restraining order" against respondent "is established by" its Merits Opinion (App. B, at 31), although conceding that the "particular ruling came in the context of discussing the plea of BRT for recovery on their injunction bond . . ." (App. B, fn. 1, at 32). Thus, "the District Court had erred in granting injunctive relief to the carriers without regard to §8 of the Norris-LaGuardia Act in the mistaken belief that §8 was completely inapplicable" (App. B, at 32). According to the Court of Appeals, the "key mistake of the District Court lay in its assertion that there is no distinction between the right to impose a

coercive fine in order to enforce an injunction and the right to compensatory damages for its violation, and that in both respects failure to obey an invalid injunction is punishable as contempt" (App. B, at 33). That was error because, as the Court of Appeals viewed the decision of this Court in *United States* v. *Mine Workers,* 330 U.S. 258 (1947), "in a 'compensatory' civil contempt proceeding—unlike a coercive civil proceeding—the alleged contemnor establishes a defense if he successfully challenges the propriety of the underlying order" (App. B, at 31).

In a petition for rehearing, we urged, among other things, that petitioners at least should be given an opportunity to demonstrate compliance with Section 8, in view of the stipulation of the parties (see p. 8, *supra*) reserving that issue for further hearing in the event Section 8 was held to be applicable, and also to demonstrate that "the imperatives of the Railway Labor Act override Section 8" in the circumstances of this case—a possibility that the Court of Appeals appeared to recognize in its Merits Opinion (see p. 11, *supra*).[11] The petition for rehearing was denied without opinion, however, on October 23, 1969 (App. D).

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[11] We do not assert what we believe to be the error of the Court of Appeals in this regard as an independent ground for grant of certiorari, but we reserve the right to argue the issue in the event that certiorari is granted. The Court of Appeals stated (App. B, at 30) that respondent struck "on the ground that they had given an appropriate notice in 1965, to take effect after the expiration of Award 282, to increase the number of firemen above that provided by the Award," and petitioners "had refused to bargain over that notice contending that it was non-bargainable." Thus, the Court of Appeals apparently was of the view that the refusal to bargain over that Section 6 notice (Notice No. 1, see fn. 8 at p. 10, *supra*), established non-compliance with Section 8 of Norris-LaGuardia as that notice had been held to be bargainable in the Merits Opinion. But, as we pointed out in the petition for rehearing, petitioners contended that the strikes were over the refusal of the carriers to restore the prior rules upon expiration of the Award (an action upheld in the Merits Opinion), respondent contended the strike was over its Notice No. 3, and no one had contended and there was no evidence of record that the strikes were over Notice No. 1. Even if the strikes were over Notice No. 1, moreover, they violated the Railway Labor Act as the procedures of the Act had not been exhausted with respect to that Section 6 proposal. See fn. 3, pp. 3-4, *supra*.

Reasons for Granting the Writ

The background of the decision by the court below is fairly complex, but the issues raised by that decision are relatively simple. The proper decision of those issues is a matter of real importance, moreover, both to the parties and to the future administration of federal statutes having wide application and of federal contempt law. The decision below concerns the relationship between the Railway Labor Act and the Norris-LaGuardia Act and the even broader problem of the circumstances in which persons injured by actions in contempt of a restraining order or injunction may recover compensatory damages. In holding that each provision of Norris-LaGuardia is to be separately "accommodated" with the Railway Labor Act and that Section 8 of Norris-LaGuardia, at least, applies to proceedings to restrain violations of the Railway Labor Act, the decision below conflicts with decisions of this Court (and of other courts of appeals) holding the Norris-LaGuardia Act *in toto* to be inapplicable to such proceedings. And, the decision below that a technical error in the issuance of a temporary restraining order prevents recovery in compensatory contempt for deliberate violations of such an order goes beyond any holding of this Court (or any other court) of which we are aware. For these reasons, as more fully set forth in the following portion of this petition, we believe that certiorari should issue to review the decision of the Court of Appeals.

I. *The Relationship Between the Railway Labor Act and the Norris-LaGuardia Act.*

The Railway Labor Act (44 Stat. 577, as amended, 45 U.S.C. § 151 *et seq.*) regulates collective bargaining in the railroad and airline industries. The Norris-LaGuardia Act (47 Stat. 70, 29 U.S.C. § 101 *et seq.*), regulates the jurisdiction and proceedings of the federal courts when injunctive

relief is sought in connection with a labor dispute subject to that Act. Section 4 of Norris-LaGuardia (29 U.S.C. § 104) deprives the federal courts of jurisdiction to issue orders restraining or enjoining certain specified activities, including "[c]easing or refusing to perform any work or to remain in any relation of employment;" *i.e.*, strikes. If jurisdiction to issue such relief is not withdrawn by Section 4, Sections 7, 8 and 9 impose procedural requirements that must be complied with before a restraining order or injunctive relief may be issued. Section 7 (29 U.S.C. § 107) requires verified and specific allegations of certain facts, proof by testimony in open court, and findings of those facts by the trial court after a hearing of which due notice is given. Section 8 (29 U.S.C. § 108), with which we are particularly concerned here, provides that "no restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." And, Section 9 (29 U.S.C. § 109) requires that the trial court make its findings prior to the issuance of any relief and that such relief be limited to specific acts alleged, proven and found.

Neither Act specifies what the relationship between them shall be. Thus, labor disputes arising under the Railway Labor Act are neither expressly subjected to Norris-LaGuardia nor expressly excepted from Norris-LaGuardia, either in whole or in part. This Court first passed upon the relationship between the two Acts in *Virginian Ry.* v. *Federation,* 300 U.S. 515 (1937). In affirming an injunction requiring a railroad to bargain with a union authorized to represent a craft of its employees pursuant to Section 2

Ninth of the Railway Labor Act (45 U.S.C. § 152 Ninth), the Court rejected a contention that the injunctive decree was invalid "for its failure to conform to the requirements of §9 of the Norris-LaGuardia Act," because:

> "It suffices to say that the Norris-LaGuardia Act can affect the present decree only so far as its provisions are found not to conflict with those of §2, Ninth, of the Railway Labor Act, authorizing the relief which has been granted. Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act."

300 U.S., at 562-563.

In *Graham* v. *Brotherhood of Firemen,* 338 U.S. 232, 237 (1949), this Court relied upon *Virginian Ry.*, which was said to hold "that the Norris-LaGuardia Act did not deprive federal courts of jurisdiction to compel compliance with positive mandates of the Railway Labor Act," in rejecting a contention that "in view of the provisions of the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.*, the District Court was without jurisdiction to grant relief by injunction" requiring a union to represent the members of its craft in a non-discriminatory manner. The respondent union in that case (which is also the respondent here) had contended that the injunction was improper because the plaintiffs had not complied with Sections 7 and 8 of Norris-LaGuardia,[12] as well as relying upon Section 4 of that Act. The decision in *Graham* was followed in *Railroad Trainmen* v. *Howard,* 343 U.S. 768, 774 (1952), which held that "the District Court has jurisdiction and power to issue necessary injunctive orders" in a similar situation "notwithstanding the provisions of the Norris-LaGuardia Act."

This problem next came before the Court in *Trainmen* v.

[12] Brief for Respondent, at 16-17.

Chicago R. & I. R. Co., 353 U.S. 30 (1957), which affirmed an injunction against a strike over a minor dispute. That is the decision which the court below, in its Merits Opinion, relied upon as establishing a "principle of accommodation" which it purported to follow in holding that Section 8 of Norris-LaGuardia applies to proceedings to enforce the mandates of the Railway Labor Act even though Section 4 does not. See pp. 11, 13-14, *supra*. It is true that this Court stated, in *Trainmen*, that there "must be an accommodation" of the two Acts. 353 U.S., at 40. But the accommodation to which this Court referred did not involve picking and choosing among the various provisions of Norris-LaGuardia. Indeed, this Court in its *Trainmen* opinion did not single out for mention any particular provision of Norris-LaGuardia, much less analyze the various provisions in some attempt to determine which should apply and which should be disregarded. The accommodation which this Court made, relying upon the legislative history of Norris-LaGuardia (353 U.S., at 40-41) as well as its *Virginian Ry., Graham* and *Howard* decisions (353 U.S., at 41-42), was that "the specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-LaGuardia Act," so that "the District Court has jurisdiction and power to issue necessary injunctive orders [to enforce compliance with the requirements of the Railway Labor Act] notwithstanding the provisions of the Norris-LaGuardia Act." 353 U.S., at 43 (bracketed insert in the original).

Our understanding of *Trainmen* is confirmed by subsequent opinions of this Court. Later in the same Term, the Court held that an arbitration provision in a collective bargaining agreement coming under the Labor-Management Relations Act could be specifically enforced despite noncompliance with Section 7 of Norris-LaGuardia. *Textile*

Workers v. *Lincoln Mills*, 353 U.S. 448, 457-459 (1957). After noting that Section 8 of Norris-LaGuardia indicates that the Act was intended to encompass arbitration, the Court nonetheless concluded that Norris-LaGuardia was inapplicable, relying in part by analogy upon the holdings in *Virginian Ry.* and *Graham* that "the Norris-LaGuardia Act does not deprive federal courts of jurisdiction to compel compliance with the mandates of the Railway Labor Act." 353 F.2d, at 458. In *Locomotive Engineers* v. *M.-K.-T R. Co.*, 363 U.S. 528, 531 (1960), the Court characterized the *Trainmen* case as holding that the injunctive relief granted did "not fall within the prohibitions of the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, because of the superseding purposes of the Railway Labor Act. . . ." And, in *Locomotive Engrs.* v. *L. & N. R. Co.*, 373 U.S. 33 (1963), the Court relied upon the *Trainmen* decision in affirming an injunction against a strike over a minor dispute which had been decided by an adjustment board, stating that in *Trainmen* "this Court concluded that the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115, was not a bar to injunctive relief against strikes" over minor disputes which had been submitted to an adjustment board. 373 U.S., at 39.

Thus, before the *Trainmen* decision, in that decision and after that decision, this Court consistently has accommodated the Norris-LaGuardia and Railway Labor Acts by holding that Norris-LaGuardia is inapplicable to orders enforcing the requirements of the Railway Labor Act, including orders restraining strikes in violation of that Act.[13] The Court has applied this "principle of accommodation,"

[13] On the other hand, if no violation of the Railway Labor Act is involved, the fact that the labor dispute is between parties subject to that Act does not prevent Norris-LaGuardia from applying. Thus, when the procedures prescribed by the Railway Labor Act in a major dispute have been exhausted, Norris-LaGuardia may apply to a suit to enjoin a strike over that dispute. *Telegraphers* v. *Chicago, & N. W. R. Co.*, 362 U.S. 330 (1960); *Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U.S. 50 (1944).

moreover, to Norris-LaGuardia as a whole, and thus has held the procedural requirements of Sections 7, 8 and 9 to be inapplicable as well as the provisions of Section 4. Contrary to the decision by the court below, at no time has this Court even so much as suggested that a distinction may be made in this regard between the various provisions of Norris-LaGuardia.[14]

We see no need to detail the lower court decisions which, in compliance with the decisions of this Court, have held generally that Norris-LaGuardia does not apply in proceedings to enforce the mandates of the Railway Labor Act, without purporting to distinguish between the various provisions of Norris-LaGuardia. We do note, however, that *Brotherhood of Railroad Train.* v. *Denver & R. G. W. R. Co.*, 290 F.2d 266 (10th Cir., 1961), cert. den., 366 U.S. 966 (1961), expressly held Section 8 of Norris-LaGuardia to be inapplicable and thus undoubtedly is in direct conflict with the decision below in this case. The Tenth Circuit stated, in this regard (290 F.2d, at 270), that:

> "It is urged that the injunction entered in this case is prohibited by Section 8 of the Norris-LaGuardia Act. . . . We think this question was answered in the [*Trainmen* decision by the Supreme Court], in which it was held that the general terms of the Norris-LaGuardia Act could not be read alone in matters dealing with railway labor disputes, and that it did not prevent injunctions to prohibit strikes growing out of minor disputes which were specifically dealt with in the Railway Labor Act."

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[14] And, of course, in connection with an application for a temporary restraining order, a showing that a violation of the Railway Labor Act *may* be involved is sufficient to avoid the application of Norris-LaGuardia since a "District Court unquestionably [has] the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its jurisdiction." *United States* v. *Mine Workers*, 330 U.S. 258, 290 (1947).

Accord, *Brotherhood of Railroad Carmen* v. *Chicago & N.W. Ry. Co.*, 354 F.2d 786, 789-796 (8th Cir., 1965).[15] See, also, *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n, Internat'l*, 416 F.2d 633, 638 (4th Cir., 1969), petition for certiorari pending, No. 995 (O.T. 1969).

Indeed, we believe that a fair reading of the Coercive Contempt Opinion by the court below will lead to the conclusion that that court there held that Norris-LaGuardia was totally inapplicable to the order temporarily restraining respondent from striking over the rules to be applied following the expiration of Award 282, despite the contrary reading given to that opinion by the court below in the decision now sought to be reviewed. See pp. 9-10, 13, *supra*. Certainly, respondent (as well as petitioners) so construed the Coercive Contempt Opinion at the time. In its petition to this Court for writ of certiorari to review that decision (No. 353, O.T. 1967), respondent here asserted (pp. 25-33) that the court below erred in holding that Sections 7 and 8, as well as Section 4, of Norris-LaGuardia were inapplicable, and indeed, that "the worst violation of Norris-LaGuardia" was the "disregard of Section 8" (p. 30).

But however that may be, we submit that the decision below in this case conflicts with decisions of this Court and of other courts of appeals. The clear line of demarcation between the Railway Labor Act and the Norris-LaGuardia

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[15] In its Merits Opinion, the court below cited the *Carmen* case as supporting its approach to Norris-LaGuardia. 385 F.2d, at 613, fn. 4. But while noting in that case that "even if the Norris-LaGuardia Act were held to apply . . ., it is arguable that at least the requirements of §8 had been met by the carrier" (354 F.2d, at 794, fn. 8), the Eighth Circuit held that "the more specific and later-enacted Railway Labor Act must prevail to allow the issuance of the injunction" (354 F.2d, at 796) even if the carrier did not comply with the procedural requirements of Sections 7, 8 or 9 of Norris-LaGuardia. An examination of the other decisions cited by the court below in that footnote to its Merits Opinion will reveal that only *Rutland Railway Co.* v. *Brotherhood of Locomotive Eng.*, 307 F.2d 21 (2d Cir., 1962), cert. den., 372 U.S. 954 (1963), lends support to its approach to Norris-LaGuardia.

Act heretofore drawn by this Court will be obscured if that decision is left standing so as to afford warrant for a separate and diverse "accommodation" of each provision of Norris-LaGuardia even in circumstances where enforcement of the mandates of the Railway Labor Act is involved, rather than disregarding Norris-LaGuardia in its entirety in such circumstances. If such a change in approach is to be adopted and the ability of the federal courts to enforce the Railway Labor Act is to be so eroded, that determination should be made by this Court after full consideration of all the relevant arguments.

We note that the petition for writ of certiorari filed by the railroads involved in the crew-consist aspect of the Merits Opinion by the court below (most of whom are also petitioners here) sought review of the holding that Section 8 of Norris-LaGuardia applied to the temporary restraining order against the BRT, asserting reasons that generally are similar to those asserted above. See Petition, No. 863, O.T. 1967, at 27-32. We do not know, of course, why the Court denied that petition. It may have been because, as was admitted in the petition (p. 32), the decision in that case had "little immediate importance to the parties" as it involved at most a nominal recovery on the injunction bond. See pp. 6-7, 11, *supra*. Here, the damages recoverable in compensatory contempt have not yet been proven, but are expected by petitioners to be very substantial. Moreover, the Norris-LaGuardia issue in the prior case may have been largely submerged by the issues relating more directly to P.L. 88-108 and the effect of the expiration of Award 282 which were raised in that petition and the related petitions. And, of course, at that time the seeming inconsistencies between the lower court's Coercive Contempt Opinion and its Merits Opinion, insofar as the accommodation of the Norris-LaGuardia and Railway Labor Acts is concerned, had not been

resolved so that this Court may have been uncertain as to where the lower court stood on that issue. But whatever the explanation may be, we remain convinced that the issue now presented is deserving of review and must ultimately be resolved by this Court.

II. *Recovery of Compensatory Contempt Damages.*

Assuming that the court below was correct in holding that the trial court erred in issuing the temporary restraining order violated by respondent, we believe that the court below was wrong in holding that the trial court's error prevents petitioners from recovering compensation in a compensatory contempt proceeding for losses caused by respondent's strikes in contemptuous violation of that restraining order. In so holding, the court below misconstrued this Court's decision in *United States* v. *Mine Workers*, 330 U.S. 258 (1947), and erected barriers to the recovery of compensatory contempt damages that are not justified by that case or by reason. If that decision is left standing, the inevitable result will be to encourage persons to violate judicial orders in the belief that even a correctable technical error in the issuance of such orders will be sufficient in itself to prevent any recovery in compensatory contempt by persons injured as a result of such contemptuous conduct.

According to the Court of Appeals, the trial court's error in temporarily restraining respondent from striking over the rules in effect following the expiration of Award 282 was the trial court's "mistaken view that §8 [of Norris-LaGuardia] is completely inapplicable." App. B, at 32. The Court of Appeals reaffirmed its view, initially asserted in its Merits Opinion (385 F.2d, at 613), that this error was not "jurisdictional" so as to deprive the trial court of jurisdiction to issue injunctive relief. App. B, at 32. The Court of Appeals did not repudiate its holdings in its Merits Opinion rejecting respondent's contention on the merits that the

rules in effect prior to Award 282 automatically were restored to full force and effect upon the expiration of the Award (385 F.2d, at 592-594, 608-612), and that "in a particular case the District Court might conclude that the imperatives of the Railway Labor Act override Section 8" of Norris-LaGuardia and issue a temporary restraining order even though Section 8 has not been complied with. Moreover, petitioners have never had the opportunity to demonstrate compliance with Section 8 contemplated by their stipulation with petitioner to the effect that the trial court initially would decide as a matter of law whether any part of Norris-LaGuardia was applicable and a subsequent trial on the compliance issue would be had if some part of that statute were held to be applicable. See p. 8, *supra*.

Nevertheless, the Court of Appeals held that the nonjurisdictional error of the trial court in holding that "§8 was completely inapplicable" in itself prevents recovery by petitioners in compensatory contempt, in the belief that this result was required by the *Mine Workers* decision. App. B, at 31-33.

In *Mine Workers*, the union had struck in violation of a temporary restraining order issued at the instance of the United States after the coal mines had been seized by the Government. The trial court found the union and its president guilty of criminal and civil contempt, and imposed criminal contempt fines in the amount of $3,500,000 as to the union and $10,000 as to its president. In affirming except for a reduction of the fine imposed on the union, this Court held that Section 4 of Norris-LaGuardia did not deprive the District Court of jurisdiction to issue the temporary restraining order as that Act does not apply to the United States (330 U.S., at 269-289) and, in the alternative, that criminal contempt sanctions could properly be imposed for violation of the restraining order even if the trial court was

without jurisdiction to issue that order by reason of Section 4 of Norris-LaGuardia (330 U.S., at 289-295).

In the course of justifying its holding on the latter point, this Court stated (330 U.S., at 294-295) that:

> "It does not follow, of course, that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order. The right to remedial relief falls with an injunction which events prove was erroneously issued, *Worden* v. *Searls*, [121 U.S. 14,] at 25, 26 [(1887)]; *Salvage Process Corp.* v. *Acme Tank Cleaning Process Corp.*, 86 F.2d 727 (1936); *S. Anargyros* v. *Anargyros & Co.*, 191 F. 208 (1911); [footnote omitted] and *a fortiori* when the injunction or restraining order was beyond the jurisdiction of the court."

The above-quoted *dictum* is the apparent basis for the belief of the court below that *Mine Workers* compelled its holding that petitioners could not recover in compensatory contempt because the trial court erred in its view that Section 8 of Norris-LaGuardia was completely inapplicable. But, an examination of the cases cited in the above quotation reveals that they involved situations in which it was subsequently established that an injunction should have been denied on the merits rather than because of some correctable procedural or evidentiary irregularity.[16] And, we believe that it is to such situations that this Court referred in stat-

[16] Of the cases cited, *Worden* itself determined that the injunction could not be sustained on the merits, the opinion on the merits in the *Salvage Process* case is reported at 86 F.2d 725, and the opinion on the merits in the *S. Anargyros* case is reported at 167 Fed. 753. The cases cited in the footnote omitted from the above-quotation from *Mine Workers* apparently were cited for *dicta* and did not directly involve recovery in compensatory contempt.

ing that the "right to remedial relief falls with an injunction which events prove was erroneously issued. . . ." This is indicated not only by the cases cited for that proposition, but also by the statement later in *Mine Workers* (330 U.S., at 304) that:

> "Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy [citing in fn. 81 the above-quoted discussion at pp. 294-295 of 330 U.S.]."

The "outcome of the basic controversy" here rejected respondent's contention that the prior rules should be restored to full force and effect when Award 282 expired, so that strikes intended to coerce the restoration of those rules were illegal and recovery by petitioners for the damages caused by such illegal strikes truly would constitute "compensation" rather than an undeserved "profit."

We suggest that it is one thing to say that a party cannot collect compensatory damages for violations of a restraining order or injunction that the trial court had no jurisdiction to enter or that was unsupportable on the merits, and quite another thing to say that the same result obtains where the error was of a non-fatal character that could have been rectified by the trial court and that did not preclude the entry of a permanent injunction. The pressures of time under which temporary restraining orders are issued, particularly where a strike is involved, generally are severe, and it is not surprising that a trial court may not always be able to anticipate every possible objection or to avoid technical errors. We suggest that, so far as compensatory damages are concerned, the burden on the injured party should be no greater

than to establish that, had the trial court anticipated every possible issue and had it applied the appropriate governing principles, the restraining order could have issued, and issued properly. Assuming that the holding by the Court of Appeals in regard to the applicability of Section 8 of Norris-LaGuardia was correct, petitioners at least should have an opportunity to demonstrate that the temporary restraining order nevertheless could properly have been issued by proving either that they complied with Section 8 or that "the imperatives of the Railway Labor Act" overrode the requirements of Section 8 in the circumstances that existed when the restraining order was issued. Petitioners should not be forever precluded from recovering in compensatory contempt for damages caused by strikes in violation of the restraining order solely because of the trial court's assumed error in considering such proof to be unnecessary. Certainly, the *Mine Workers* decision is not to the contrary, the cases cited in *Mine Workers* for the *dictum* relied upon below are not to the contrary, and we do not know of any other decision denying recovery in compensatory contempt because of an error of the kind found by the court below to have been committed by the trial court in issuing the underlying restraining order. If such a far-reaching doctrine is to be established, it should be established by this Court after due consideration of all the factors that may be involved.

Consequently, we believe that the decision below on this issue also deserves review by this Court and that certiorari should be granted for that purpose as well as to review the holding on the relationship between the Norris-LaGuardia and Railway Labor Acts.

Conclusion

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the District Court*

The Court: This Court is of the opinion that a distinction cannot be drawn between the right to impose a coercive fine in order to enforce an injunction or a restraining order and the right to compensatory damages for its violation.

The validity of the restraining order has been upheld. Even if it was invalid there would be recourse to the decision of the Supreme Court in the Mine Workers case to the effect that even an invalid injunction must be obeyed and failure to obey it is punishable as a contempt.

In view of these circumstances the motion to dismiss the compensatory contempt proceeding is denied.

APPENDIX B

OPINION OF THE COURT OF APPEALS

On Appellant's Petition for Further Relief To Enforce the Court's Prior Opinion and Judgment

Decided February 28, 1969

Mr. Joseph L. Rauh, Jr. with whom *Messrs. John Silard, Daniel H. Pollitt, Isaac N. Groner, David Epstein, Stephen E. Moss* and *Alex Elson,* were on the petition, for appellant.

Mr. Richard T. Conway, with whom *Messrs. Francis M. Shea* and *William H. Dempsey, Jr.,* were on the opposition to the petition, for appellees.

Before: DANAHER,* BURGER and LEVENTHAL, *Circuit Judges.*

PER CURIAM: In this case we grant the petition filed by Brotherhood of Locomotive Firemen and Enginemen (BLFE) for a ruling concerning the intention and effect of our previous rulings in the railroad work rules litigation.

It suffices for present purposes to recall that an action was filed on March 24, 1966, by the nation's railroads against BLFE (Firemen), concerning the situation that would confront the nation with the expiration on March 31, 1966, of the fireman-manning Award of Arbitration Board 282. The Firemen were to strike on the ground that they had given an appropriate notice in 1965, to take effect after the expiration of Award 282, to increase the number of firemen above that provided by the Award. The railroad had refused to bargain over that notice, contending that it was non-bargainable. They obtained a temporary restraining order on March 28, against strikes by the BLFE over any dispute as to the rules to be applied by the carriers after the expiration of that period. The BLFE struck certain carriers the morning of March 31, and these strikes were specifically enjoined by a supplement to the temporary restraining order entered that day. The strike terminated on April 3. On April 29 the carriers filed two motions—one for an order

* Circuit Judge Danaher became Senior Circuit Judge on January 23, 1969.

awarding compensatory damages for contempt, and one for an order assessing a fine as a coercive penalty for failure to terminate the contempt.

The "coercive contempt" matter came before us in No. 20316, wherein this court overruled BLFE's effort to interpose a defense based on the invalidity of the restraining order under the Norris-LaGuardia Act. *BLFE v. Bangor & Aroostook R.R. Co.*, 127 U.S.App.D.C. 23, 380 F.2d 570 (1967). The court held that a coercive contempt fine could stand even assuming the restraining order itself was beyond the jurisdiction of the District Court by virtue of the Norris-LaGuardia Act. It held the doctrine of *United States v. United Mine Workers*, 330 U.S. 258 (1947), which allows alleged contemnors to challenge the propriety of the underlying order in defense of an otherwise contemptuous disobedience to be a "directive in regard to, the right of defendants in criminal and *compensatory* civil contempt proceedings," but declared that "prospective, coercive fines should be enforceable despite a subsequent determination by the District Court, or on appeal, that the disregarded order was in fact beyond the ordering court's jurisdiction." *See* 127 U.S.App.D.C. at 36, 380 F.2d at 583.

That coercive contempt case, however, is not the subject of our present consideration. In the opinion cited above this court remanded to provide a trial to defendants on a contested issue, and that proceeding is in the bosom of the court. What we are concerned with is the other motion filed by the carriers, for compensatory damages. The District Court declined to dismiss the compensatory contempt proceeding. We think appellants are entitled to relief declaring that such dismissal is a corollary that follows from the rulings of this court on the merits.

In No. 20316, as noted above, this court (following *Mine Workers*) pointed out that in a "compensatory" civil contempt proceeding—unlike a coercive civil proceeding—the alleged contemnor establishes a defense if he successfully challenges the propriety of the underlying order.

The lack of propriety of the restraining order is established by this court's ruling on the merits in No. 20152 et al. *See* opinion of May 12, 1967, and supplemental opinion of

July 31, 1967, reported together *sub nom. Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R.R. Co.*, 128 U.S.App.D.C. 59, 385 F.2d 581 (1967), *cert. denied*, 390 U.S. 923 (1968). In the May 12 opinion this court held, reversing the District Court, that there had been an unlawful refusal by the carriers to bargain with the firemen. In the July 31 opinion we held[1] that the District Court had erred in granting injunctive relief to the carriers without regard to § 8 of the Norris-LaGuardia Act,[2] in the mistaken view that § 8 was completely inapplicable. Section 8 provides that a federal court shall not grant a restraining order in a labor dispute where the complainant "has failed to comply with any obligation imposed by law which is involved in the labor dispute in question." We said (128 U.S.App.D.C. at 91-92, 385 F.2d at 613-14):

> The District Court erred in concluding that because it held, correctly, that the action was not subject to Section 4 of the Norris-LaGuardia Act, which would have ousted the court of jurisdiction, it necessarily followed that the "clean hands" provision of Section 8 of the Norris-LaGuardia Act was likewise wholly inapplicable. * * * In saying that the restraining order was erroneously entered, however, we do not mean that would excuse a contemptuous violation.

The last sentence quoted related to the earlier ruling in No. 20316 that the irregularity of the injunction would not provide a defense in a coercive contempt proceeding. And the July 31 ruling specifically affirmed and adhered to the ruling in No. 20316—by the same panel—that the District Court was correct in holding that it had jurisdiction to enjoin a violation of the Railway Labor Act, and that this jurisdiction was not negatived by § 4 of the Norris-LaGuardia Act.[3] *See* 128 U.S.App.D.C. at 91, 385 F.2d at 613.

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[1] The particular ruling came in the context of discussing the plea of BRT for recovery on their injunctive bond, but no one contends there is any meaningful difference between the unions in regard to the question at bar. This court assumed that the District Court would issue rulings applying and implementing the decision of this court.

[2] *See* 29 U.S.C. § 108 (1964).

[3] Though at one point there is general language in No. 20316 that the Norris-

However, as noted, the District Court acted improperly in the exercise of its jurisdiction when it did not heed the "clean hands" provision of § 8 of that law.

The key mistake of the District Court lay in its assertion that there is no distinction between the right to impose a coercive fine in order to enforce an injunction and the right to compensatory damages for its violation, and that in both respects failure to obey an invalid injunction is punishable as a contempt.[4] That that is error is clear from the rulings already quoted. The invalidity of the order is no bar to a proceeding that vindicates a public right, the authority of the court. However the railroads' right to compensation depends on their establishing a private right, to the injunctive relief, and in this case that right was negatived by their own unlawful refusal to bargain on BLFE's notice of a proposed change in manning work rules.

A question arises as to the appropriate form of relief. While in some cases mandamus has been used,[5] we see no occasion to think in terms of formal mandates. The District Court is, we are confident, fully concerned to provide the fresh outlook of settling disputes between unions and railroads in furtherance of the Congressional objective of agreement and harmony.[6] It is for that reason that we think this an appropriate case to clarify the intention of our prior rulings, and pull out from the litigation a thorn that might otherwise fester. It suffices for that purpose to issue this opinion which will in due course be transmitted to the District Court.[7]

Petition Granted.

LaGuardia Act did not preclude the restraining order against BLFE, it is clear from several places in context that what this court was troubled by and focused on was the claim that defendants were being fined for violating an order that was beyond the jurisdiction of the District Court. Even this is no defense in a coercive contempt proceeding, as noted above, but it was reassuring that the District Court did in fact have jurisdiction notwithstanding § 4. In exercising that jurisdiction, it was required to observe the clean hands provision of § 8.

[4] *See* Tr. May 28, 1968, p. 62.

[5] *See* Federal Home Loan Bank v. Hall, 225 F.2d 349, 385 (9th Cir. 1955), *cert. denied*, 350 U.S. 968 (1957).

[6] *See* 128 U.S.App.D.C. at 82-83, 385 F.2d at 604-5.

[7] *Cf.* S.S. Kresge Co. v. Winget Kickernick Co., 102 F.2d 740 (8th Cir.), *cert. denied*, 308 U.S. 557 (1939).

APPENDIX C

ORDER OF THE COURT OF APPEALS

Before: Danaher,* Burger and Leventhal, Circuit Judges.

ORDER

On consideration of the petition of Brotherhood of Locomotive Firemen and Enginemen for further relief to enforce this Court's prior opinion and judgment, and of the responsive pleadings filed with respect thereto, and after hearing argument by counsel, it is

ORDERED AND ADJUDGED by this Court that the aforesaid petition is hereby granted to the extent set forth in the opinion of this Court filed herein this date.

Per Curiam.

Dated: February 28, 1969.

Opinion per curiam.

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* Circuit Judge Danaher became Senior Circuit Judge on January 23, 1969.

APPENDIX D

ORDER OF THE COURT OF APPEALS*

Before: Danaher, Senior Circuit Judge, Leventhal and Robb, Circuit Judges; in Chambers

ORDER

The Clerk is directed to file all of the responsive pleadings lodged with respect to the following:

The motion of Bangor and Aroostook Railroad Company, et al. to terminate the stay of further proceedings;

The petition of Bangor and Aroostook Railroad Company, et al. for rehearing of the opinion and order of February 28, 1969;

The motion of Bangor and Aroostook Railroad Company, et al. to recall the mandate and to clarify the opinion and judgment;

The motions of the Brotherhood of Locomotive Firemen and Enginemen for interim injunctive relief and for immediate oral argument thereon.

On consideration of the foregoing motions and responsive pleadings, it is

ORDERED by the Court that the stay of further proceedings in the above entitled cases heretofore ordered on April 23, 1969 is hereby terminated, and it is

FURTHER ORDERED by the Court that the petition of Bangor and Aroostook Railroad Company, et al. for rehearing, is denied, and it is

FURTHER ORDERED by the Court that the motion of Bangor and Aroostook Railroad Company, et al. to recall the mandate and to clarify the opinion and judgment is denied, and it is

FURTHER ORDERED by the Court that the motions of Brotherhood of Locomotive Firemen and Enginemen for interim injunctive relief and for immediate oral argument thereon, are denied.

* Filed October 23, 1969.

The Court is of the view that the case does not warrant revision of its outstanding opinions or mandates, and that the interpretation and application of these opinions to the fact situations now presented should be determined by the District Court in the first instance. The District Court has continuing jurisdiction to hear and rule on requests for interim or permanent injunctive relief.

Per Curiam.

(8782-5)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1099

BANGOR AND AROOSTOOK RAILROAD COMPANY, ET AL., *Petitioners,*

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Respondent.*

BRIEF IN OPPOSITION

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IN THE

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BANGOR AND AROOSTOOK RAILROAD COMPANY, ET AL., *Petitioners,*

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BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Respondent.*

BRIEF IN OPPOSITION

Counterstatement of Questions Presented

1. Whether in Railway Labor Act disputes the Norris-LaGuardia Act is applicable to the extent that its Section 8 "clean hands" requirement bars grant of anti-strike injunctions to carriers violating the Railway Labor Act's basic bargaining duty?

2. Whether compensatory contempt damages may be awarded for violation of an injunction which was erroneously issued in disregard of Section 8 of the Norris-LaGuardia Act?

Counterstatement of the Case

This case involves an effort by petitioning carriers to collect compensatory contempt damages on account of a strike provoked by their own violations of the Railway Labor Act, and on the basis of strike injunctions erroneously issued in disregard of the "clean hands" bar in Section 8 of the Norris-LaGuardia Act. The circumstances

giving rise to the strike and the injunctions may be succinctly stated.

During the two-year life of the Award under Public Law 88-108, the BLF&E earnestly sought to negotiate the work rules and manning rights to apply upon the expiration of the Award on March 31, 1966. To facilitate timely agreement, in the fall of 1965 the BLF&E served three bargaining notices on the carriers, the most important of which was unquestionably Notice No. 1 covering the subject of levels of fireman manning to apply upon expiration of the Award. The carriers, however, refused to bargain with the BLF&E during the period of the Award, although Congress had hoped and anticipated that during that period the parties would come to agreement settling their differences on the manning issue,[1] and even though the carriers had unequivocally promised Congress to undertake such bargaining.[2] See *infra*, Appendix A, at p. 18.

[1] That theme is found in the preamble recitation of Public Law 88-108 that it is desirable to achieve the stated objectives of the law "in a manner which preserves and prefers solutions reached through collective bargaining," and is emphasized throughout the legislative history. The precipitating message by President Kennedy urged a Congressional enactment which would encourage "the parties to achieve their own solutions through collective bargaining" and provide "for an interim remedy while awaiting the results of further bargaining by the parties." 109 Cong. Rec. 13004, 13006. Senator Morse underlined that the two-year arbitration "would encourage and stimulate the parties to continue to bargain in order to develop final solutions . . ." 109 Cong. Rec. 15976. Secretary of Labor Wirtz made the same point in his Senate testimony, when in response to Senator Pastore's question about the temporary nature of the arbitration he said: "I would assume, Mr. Chairman, in complete good faith within that two-year period the parties would have worked out the resolution of this matter." Hearings before the Senate Committee on Commerce, on S.J. Res. 102, 88th Cong., 1st Sess., 49-50. This Court underlined this clear Congressional intention when it noted that the President had recommended legislation "for an interim remedy while awaiting the results of further bargaining by the parties." *Engineers* v. *Chicago, R.I. & P.R. Co.*, 382 U.S. 423, 431 (1966).

[2] Chairman James E. Wolfe of the National Railway Labor Conference stated before the Senate Committee that during the two-year period "the parties themselves, as they eventually will have to do some time or another,

The BLF&E was presented with a serious dilemma by the carriers' refusal to bargain. The situation was aptly characterized in statements which the carriers themselves submitted to the District Court in their subsequent application for an anti-strike injunction. As the carriers set forth in the affidavit of James E. Wolfe (pp. 26-27 of Joint Appendix in No. 20,316 in the Court below): "Frank C. Porter of the Washington Post reported in the January 19 issue of that newspaper that: 'President H. E. Gilbert of the Brotherhood of Locomotive Firemen and Enginemen, AFL-CIO said a strike could come March 31 *if the carriers refuse to bargain* on restoration of firemen to freight and yard engines' . . . 'D. C. (Del) Deering, Vice President of the AFL-CIO Brotherhood of Locomotive Firemen and Enginemen said in an interview . . . that the Santa Fe, Southern Pacific and four other railroads will be struck March 31 *unless management agrees to negotiate* for restoration of the jobs of firemen.'" (emphasis supplied).

The BLF&E determined that, in view of the carriers' bargaining refusal, its only recourse was to strike. Thereupon, just prior to the Award's expiration the carriers obtained from Judge Holtzoff a temporary anti-strike restraining order on March 28, 1966, and then a supplemental temporary restraining order on March 31, 1966. Judge Holtzoff declined to entertain the BLF&E objection that "the carriers have at all times refused to bargain, thereby violating Section 8 [of Norris-LaGuardia]" because, as the carriers concede (Pet. p. 8), he "held Norris-LaGuardia in its entirety to be inapplicable" to controversies under the Railway Labor Act.

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will finally dispose of these . . . disputes by collective bargaining." Indeed, Mr. Wolfe *promised* the House Commerce Committee that "we will be willing to bargain under any circumstances." Hearings before the Senate Committee on Commerce, on S.J. Res. 102, 88th Cong., 1st Sess. 364 (1963); hearings before House Committee on Commerce, on H.J. Res., 565, 88th Cong., 1st Sess., 559 (1963).

Thereafter, in its decisions of May 12 and July 31, 1967, the Court of Appeals found the carriers to have been guilty of refusal to bargain as required by the Railway Labor Act, and to have been precluded from the injunctive relief granted by Judge Holtzoff by virtue of the "clean hands" bar in Section 8 of the Norris-LaGuardia Act. The relevant portion of the May 12, 1967 opinion holding the carriers to have been in violation of the Railway Labor Act bargaining duty appears in Appendix A, *infra*, p. 17. There the Court of Appeals rejected the carriers' contention that during the life of the Award they were freed from their collective bargaining duties under the Railway Labor Act (*infra*, at p. 19). Accordingly, the Court ruled (*infra*, at pp. 22-23) that since "the carriers flatly refused to engage in any statutory bargaining whatever prior to the expiration date . . . the carriers before us must be held to have breached their statutory duty under the Railway Labor Act to confer and bargain on the merits of proposed changes in work rules."

Recognizing that its May 12, 1967 opinion did not decide all the issues, the Court of Appeals invited the parties to brief the relevant remaining questions (385 F. 2d at p. 605). Among the issues then briefed and subsequently disposed of in the Court's Supplemental Opinion of July 31, 1967, was the impact of its finding of unlawful carrier refusal to bargain upon the validity of the injunctive relief issued by Judge Holtzoff. The question arose specifically over the trainmen's request for recovery on their injunction bond. They based their claim on the ground that Judge Holtzoff's injunction had been issued in violation of Section 8 of the Norris-LaGuardia Act, which bars injunctive relief to a party in a labor dispute who has not met his bargaining obligations.

The portion of the July 31 opinion disposing of the Section 8 question is set forth in Appendix B, *infra*, p. 24. There the Court of Appeals allowed recovery by the union on the injunction bond, finding that "the restraining order was erroneously entered" since Judge Holtzoff had disregarded Section 8 of Norris-LaGuardia (*infra*, p. 26). As the Court succinctly put it (infra, p. 24), the District Court "erred" in issuing its restraining order "because—as we have subsequently held in our May 12, 1967 ruling—the complainant carriers had failed to comply with their obligations under the Railway Labor Act." As the Court emphasized, accommodation of the requirements of Section 8 with those of the Railway Labor Act is a principle confirmed by rulings of this Court and lower courts (*infra*, p. 25, n. 4) and application of Section 8 of Norris-LaGuardia "*would not trammel but would rather further the effectuation of that Railway Labor Act; for it ensures compliance by complainant carrier or union which cannot seek an injunction until and unless it has discharged the obligations imposed by the Railway Labor Act*" (*infra*, p. 25; emphasis supplied.)[3]

[3] In view of the clear applicability of Section 8 there was no need for determination in the Court below whether the BLF&E strike which was enjoined by Judge Holtzoff was in any sense illegal, but we cannot refrain from noting the clear error in the carriers' claim that it was. The authorities make quite clear that a union may lawfully strike if a carrier refuses to honor its Railway Labor Act obligations. As the Court of Appeals emphasized in *United Industrial Workers v. Board of Trustees of Galveston*, 400 F. 2d 320, 334 (5th Cir. 1968) *cert. denied*, 395 U.S. 905: "If the carrier refuses to follow the procedures of the Act, or if those procedures are followed to an impasse, the Union may strike. The Union's right to bargain, guaranteed by the Act, 45 U.S.C. § 152, Fourth, and presently enforced by this Court, would be illusory without a right to strike when bargaining has run its course if the Carrier continues to refuse to bargain."

Similarly, in *Florida East Coast Railway Co. v. Brotherhood of Locomotive Engineers*, 362 F. 2d 482, 485-86, the Court rejected a claim that the Union was barred from striking when the carrier had failed to comply with the Railway Labor Act: "The action of the Unions in striking, was

While the ruling concerning the invalidity of Judge Holtzoff's grant of injunctive relief was over an issue particularly involving the trainmen, the holding clearly rendered equally invalid the injunctions contemporaneously issued by Judge Holtzoff against the BLF&E. Accordingly, the BLF&E moved for dismissal of the pending compensatory contempt proceeding wherein the carriers sought to recover damages for alleged violations of Judge Holtzoff's injunctions against the BLF&E. Judge Holtzoff, however, denied dismissal of the compensatory contempt proceeding on the erroneous view that the doctrine of the *Mine Workers* case permits not only punitive but also compensatory contempt awards based on an invalid injunction (see Pet., p. 29).

On February 28, 1969, in the decision the carriers now proffer for review, the Court below reversed Judge Holtzoff. In its decision, the Court reemphasizes (see Pet., p. 33) its earlier holding that in issuing the injunctions "the District Court acted improperly in the exercise of its jurisdiction when it did not heed the 'clean hands' provision of § 8 [of Norris-LaGuardia]". The Court below holds that the compensatory contempt proceeding must be dismissed because (Pet., p. 31) "in a 'compensatory' civil contempt proceeding . . . the alleged contemnor establishes a defense if

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not in derogation of the processes of the Railway Labor Act. It was in support of the Act. The unions were not striking to change rules, pay rates, or working conditions; they were striking because the carrier had violated the Act by making such changes without following the statutory procedure required in the Act. They did not have unclean hands under these circumstances . . ." See also *Telegraphers* v. *Chicago and Northwestern R. Co.*, 362 U.S. 330, 338-341 (1960), rejecting the carrier's contention that the strike was "unlawful"; Comment, *Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes*, 60 Colum. L. Rev. 381, 389, fn. 51 (1960). Cf. *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270 (1956). Thus it is clear from the decisional law that the BLF&E did not in fact transgress the Railway Labor Act when it was provoked to resort to self help by the carriers' violation of their statutory bargaining duty.

he successfully challenges the propriety of the underlying order. The lack of propriety of the restraining order is established by this court's [1967] ruling on the merits . . ." We demonstrate hereinafter that, contrary to the carriers' suggestion, the Court below acted quite properly, both in holding that application of Norris-LaGuardia Section 8 "would not trammel but would rather further the effectuation of the Railway Labor Act", and in its holding that the erroneous issuance of the underlying injunction, in disregard of Section 8, removed the predicate for award of any compensatory contempt damages.

REASONS FOR DENYING THE WRIT

I

The Court Below Has Properly Followed The Norris-LaGuardia Accommodation Principle Repeatedly Approved And Applied By This Court.

Applying the "clean hands" requirement of Norris-LaGuardia's Section 8, the Court below held that carriers flaunting the Railway Labor Act duty of collective bargaining were not entitled to injunctions prohibiting a strike by the rebuffed union. In so doing, the Court of Appeals expressly applied this Court's "accommodation" principle, which seeks to give effect to the Norris-LaGuardia Act except where to do so would nullify a specific provision of a subsequently enacted labor law. Here the Court of Appeals found *confluence* rather than *conflict* between the Railway Labor Act's bargaining duty (violated by the carriers) and the thrust of Norris-LaGuardia's Section 8 which denies injunctive relief to a party violating that duty.

Having already been denied review of that ruling below (No. 863, Oct. Term, 1967), the carriers are here for a second try. They again attack the accommodation ruling below, asserting that this Court has generally held Norris-La-

Guardia inapplicable to the Railway Labor Act disputes (Pet. pp. 19-20). They claim that a "clear line of demarcation" will be obscured if federal courts engage in "separate and diverse 'accommodation' of each provision of Norris-LaGuardia even in circumstances where enforcement of the mandates of the Railway Labor Act is involved, rather than disregarding Norris-LaGuardia in its entirety . . ." (Pet. 21-22). But, contrary to the carriers' claim, this Court has long approved and applied an accommodation principle which *seeks to give effect* to Norris-LaGuardia even in labor disputes generally regulated by subsequently enacted federal statutes, except where to do so would nullify a specific and important provision of the later statute. Thus, the Court has upheld the application of Norris-LaGuardia not only to labor disputes which may involve a violation of the Sherman Act (*Milk Wagon Drivers' Union* v. *Lake Valley Farm Products*, 311 U.S. 91, 103 (1940), but also to those under the Railway Labor Act (*Telegraphers* v. *Chicago & N.W. Ry. Co.*, 362 U.S. 330 (1960); *Brotherhood of Railroad Trainmen* v. *Toledo P.&W.R. Co.*, 321 U.S. 50 (1944)[4]

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[4] The Courts of Appeals have emphasized that the Norris-LaGuardia Act "prohibits the issuance of an injunction in a railway labor case involving a 'major dispute.'" *Butte, Anaconda & P. Ry. Co.* v. *Brotherhood of Loc. Fire. & Eng.*, 268 F. 2d 54, 58 (9th Cir. 1959). They have uniformly recognized the limitations which Norris-LaGuardia imposes upon the power of District Courts to issue injunctions restraining strikes when "major disputes" under the Railway Labor Act are involved. *Brotherhood of Railroad Carmen* v. *Chicago & N.W. Ry. Co.*, 354 F. 2d 786 (8th Cir. 1965); *Missouri-Illinois R. Co.* v. *Order of Railway Conductors*, 322 F. 2d 793 (8th Cir. 1963); *Pullman Company* v. *Order of Railway Conductors & Brakemen*, 316 F. 2d 556 (7th Cir. 1963), *cert. denied*, 375 U.S. 820 (1963); *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers*, 307 F. 2d 21 (2d Cir. 1962). Cf. *Sinclair Refining Company* v. *Atkinson*, 290 F. 2d 312 (7th Cir. 1961), aff'd, 370 U.S. 195 (1962). The present issue, of course, arose from the "major dispute" over the BLF&E's bargaining proposals which the carriers refused to negotiate.

and under the National Labor Relations Act (*Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195; *Bakery Drivers Union* v. *Wagshal*, 333 U.S. 437, 442; cf. *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421, 429, n. 15).

Soon after Norris-LaGuardia, Congress enacted the 1934 Railway Labor Act provisions and the 1935 National Labor Relations Act, without specifically purporting either to limit or preserve application of the Norris-LaGuardia Act's restrictions on injunctive relief to parties. The inevitable question of statutory construction concerning injunctive enforcement of the later statutes' provisions came before this Court in *Virginian Railway Co.* v. *System Federation*, 300 U.S. 515, 563 (1937). This Court, in approving the District Court's injunction requiring the employer to bargain with the union certified by the National Mediation Board, found the employer's Norris-LaGuardia objections "strained and unnatural constructions" conflicting with that Act's "declared purpose". It went on to warn that in any event "the Norris-LaGuardia Act can affect the present decree only so far as its provisions are found not to conflict with those of Section 2, Ninth, of the Railway Labor Act . . . Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act." This basic accommodation rule announced in *Virginian Railway*—seeking to give effect to the Norris-LaGuardia Act "so far as its provisions are found not to conflict" with specific rights incorporated in subsequent labor legislation—has been consistently followed by this Court in subsequent railway labor cases.

Thus, in *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W.R. Co.*, 321 U.S. 50 (1944), Norris-LaGuardia was held to bar a District Court injunction against union acts of theft and violence threatening company property and operations. There the carrier had refused to arbitrate the

underlying bargaining dispute under the Railway Labor Act, thus invoking the stricture of Section 8 of Norris-LaGuardia that a party seeking injunctive relief in a labor dispute must first have made "every reasonable effort" to settle the dispute. This Court found as concerns Section 8 (321 U.S. at p. 56) that the carrier's *"steadfast refusal to agree to arbitration under the Railway Labor Act's provisions made the section operative."* Moreover, the Court specifically answered the objection that by application of Section 8 it was in effect requiring the carrier to accept an arbitration procedure which the Railway Labor Act does not make mandatory. In that respect, it noted (321 U.S. at p. 57, n.12) that when Norris-LaGuardia was enacted the original Railway Labor Act of 1926 was already in force, and continued (at p. 58):

> "Section 8 is not limited to railway labor disputes. But it includes them. And its very terms show they were used in explicit contemplation of the procedures and machinery then existing under the Railway Labor Act and with the intent of making their exhaustion conditions for securing injunctive relief, not singly or alternatively, but conjunctively or successively, when available. This purpose of Congress is put beyond question when the section's legislative history is considered in the light of the history and the basic common policy of the two statutes, the Railway Labor Act and the Norris-LaGuardia Act. The policy of the Railway Labor Act was to encourage use of the nonjudicial processes of negotiation, mediation and arbitration for the adjustment of labor disputes . . . The over-all policy of the Norris-LaGuardia Act was the same."

The Court further underscored (at p. 56) the direct nexus between arbitration under the Railway Labor Act and Norris-LaGuardia's clean hands rule: "Clearly arbitration

under the Act was a method, both reasonable and available, which respondent refused to employ, not once, but repeatedly and adamantly. If it had been used, it would have averted the strike, the violence which followed, and the need for an injunction." Obviously, if refusal of arbitration (which is not mandatory) brings Section 8 into operation, refusal to bargain (which is mandatory) is an even more compelling reason for that result.

The accommodation principle is confirmed also by the subsequent rulings in the *Trainmen* (Chicago River) and *Telegraphers* decisions. In *Trainmen* v. *Chicago River & I.R. Co.*, 353 U.S. 30 (1957) this Court found the Railway Labor Act's compulsory arbitration procedure in minor dispute cases to require, notwithstanding Norris-LaGuardia's anti-injunction policy, that District Courts enjoin a union "from striking to defeat the jurisdiction of the Adjustment Board" while a minor dispute is pending before the Board (353 U.S. at p. 39). But in so doing, the Court again emphasized the general accommodation principle (at p. 40):

> "We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable."

More recently, in *Telegraphers* v. *Chicago & N.W. Railway*, 362 U.S. 330 (1960), this Court held that Norris-LaGuardia's anti-injunction provisions apply to bar judicial restraint of a strike in aid of union bargaining demands asserted pursuant to the Railway Labor Act. The *Trainmen* case was explained as an exception to the accommodation principle, where a strike injunction was

authorized "to prevent a plain violation of a basic command of the Railway Labor Act . . ." (362 U.S. at 339). "Here, far from violating the Railway Labor Act," the Court continued in *Telegraphers*, "the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes . . ." [5]

In the present case the Court of Appeals has followed the accommodation principle announced in *Virginian Railway*, affirmed in *Trainmen*, and applied in the *Toledo* and *Telegraphers* decisions. The holding below that carriers cannot wrongfully refuse to bargain and then obtain injunctions against the union's recourse to a strike is predicated precisely upon the point emphasized in *Toledo*, that Section 8 of Norris-LaGuardia does not undermine but actually supports the common purpose of both Acts *"to encourage use of the nonjudicial processes of negotiation . . ."* The Court of Appeals sought to give vitality to the collective bargaining mandate by subjecting carriers who flaunted that Railway Labor Act obligation to the clean hands rule of Norris-LaGuardia. The decision below thus gives effect to "the basic common policy of the two statutes, the Railway Labor Act and the Norris-LaGuardia Act" (321 U.S. at

[5] There is no merit to the petitioners' suggestion that the ruling below conflicts with that of the Tenth Circuit in *Brotherhood of Railroad Trainmen* v. *Denver & R.G.W.R. Co.*, 290 F. 2d 266 (1961), *cert. denied*, 366 U.S. 966. That case involved an injunction against a strike over the carrier's refusal to pay an Award of the Adjustment Board. It appears (see Petition in No. 979, Oct. Term 1960, p. 19) that the Section 8 claim was based on the railroad's non-payment of the Award—certainly a dubious contention under that section. In any event, all that the Court held in rejecting the Section 8 claim was that the mandatory Adjustment Board procedure, which this Court vindicated in the *Trainmen* case by approving an injunction, remains the exclusive procedure at the subsequent stage of judicial review. The Tenth Circuit opinion relies on the *Trainmen* ruling, and is simply a logical corollary of its principle that the statutory minor dispute arbitration procedure may be protected by judicial injunction.

p. 58). The radical departure of the carriers from the decisions of this Court would irrationally inhibit operation of Norris-LaGuardia and equally disserve the key purpose of the Railway Labor Act, for it would reward a nonbargaining carrier by enjoining the strike provoked by its own statutory violation. The result approved below is in every sense appropriate and there is no ground for reconsideration here of this Court's well established accommodation doctrine.

II

Since the Underlying Injunction Was Improperly Issued In Disregard Of Section 8 Of Norris-LaGuardia, No Predicate Remains For Award Of Compensatory Contempt Damages.

In its ruling in *United States* v. *United Mine Workers*, 330 U.S. 258, 294-295 (1947), this Court definitively ruled that, although the invalidity of the underlying injunction may still permit punitive contempt proceedings, it precludes the possibility of compensatory contempt relief. The Court warned that "it does not follow" from the rule applicable in punitive contempt that a plaintiff "may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order. The right to remedial relief falls with an injunction which events prove was erroneously issued . . ." As the Court of Appeals ruled on July 31, 1967 (see *infra*, Appendix B, p. 24) and re-emphasized in the decision now before this Court (Pet. at p. 33), "the District Court acted improperly in the exercise of its jurisdiction when it did not heed the 'clean hands' provision of Section 8 [of Norris-LaGuardia]" since the nonbargaining carriers were not entitled to injunctive relief. Applying the self-evident principle confirmed by *Mine Workers*, the Court below dis-

missed the carriers' compensatory contempt proceedings because "the railroads' right to compensation depends on their establishing a private right to the injunctive relief, and in this case that right was negatived by their own unlawful refusal to bargain . . ." (Pet., p. 33).

The carriers, however, urge (Pet., p. 15) that in this case the flaw in the issuance of the underlying injunctions was merely "technical error" which should not cause invocation of the *Mine Workers* limitation. But their plea of technicality hardly merits serious consideration. Thus, in the "coercive contempt" proceeding in the Court below (No. 20,316, *BLF&E* v. *Bangor & Aroostook R. Co.*, 380 F. 2d 570 (1967), *cert. denied*, 389 U.S. 327) the carriers' brief (pp. 26-31) confessed that "sound reasons" support this Court's pronouncement in *Mine Workers* "that a civil compensatory fine cannot stand after reversal of the underlying order." As the carriers conceded, *"Of course a plaintiff may not profit by way of a civil contempt fine for damages sustained through violation of a Court order, if the order is later determined invalid, since he could not have suffered damages in a legal sense."* Now, however, the carriers would dismiss as a dictum intended to have only limited application, this Court's emphasis in *Mine Workers* that "the right to remedial relief falls with an injunction which events prove was erroneously issued." Petitioners suggest (Pet., p. 25) that this Court meant to bar compensatory contempt only where it is established that the underlying injunction should have been denied "on the merits rather than because of some correctable procedural or evidentiary irregularity."

In response to that remarkable suggestion perhaps it should suffice that just as science repels the concept of partial pregnancy our legal system knows no principle of partial illegality. When the carriers urge that the invalidity

of the underlying injunctions be overlooked because under different circumstances the judicial error might have been avoided, they proffer an argument too conjectural for practical application. When for any reason an injunction for whose violation damages are sought has finally been held erroneous, there simply remains no valid judicial order to support compensatory contempt relief and it is quite beside the point what might have happened had the court avoided the error which invalidated its injunction.

In any event, there remains the plain fact in this case that the District Court's disregard of Norris-LaGuardia simply cannot be dismissed, as the carriers would dismiss it, as some "correctable procedural or evidentiary irregularity". The clean hands requirement of Section 8, as this Court emphasized in *Toledo* (see *supra*, p. 10), is not a procedural nicety but a substantive rule incorporating a vital Congressional policy reflected both in Norris-LaGuardia and the Railway Labor Act. As the Court put it, the requirement for exhausting all avenues of bargaining and negotiation is a *"basic common policy"* of the Railway Labor Act and Section 8 of Norris-LaGuardia.

Thus, a District Court which issues an injunction in disregard of Section 8 of Norris-LaGuardia commits fundamental and substantive error. The statute denies to carriers flaunting the Railway Labor Act's bargaining requirement an injunction against a strike provoked by their law violation. That they should nevertheless have compensatory damages based upon the injunction erroneously issued is a result precluded by *Mine Workers*, by the general doctrine of "clean hands", and the salutary principle that no man shall profit from the consequences of his own wrongdoing (*Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231). The carriers having provoked a strike by violation of their bargaining obligations, they cannot shift to the union the

consequences flowing from their precipitating statutory violation.

Conclusion

Both of the legal principles the carriers now challenge emanate from historic decisions of this Court. In *Virginia Railway* the Court announced the Norris-LaGuardia accommodation principle which it has consistently followed since 1937, and in *Mine Workers* it affirmed the self-evident principle precluding compensatory contempt relief based on an invalid injunction. Both of the doctrines the carriers seek to challenge have long ago received the considered approbation of this Court. Since no reason has been set forth for their reconsideration at this point in time or in the context of this long and complicated litigation concerning fireman manning, it is submitted that the writ should be denied.

Respectfully submitted,

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APPENDIX A

Extract From The Decision Of The Court Of Appeals For The District of Columbia Circuit, May 12, 1967 In Brotherhood of Railroad Trainmen v. *Akron & B.B. R. Co.* (385 F. 2d 581, *cert. den.* 390 U.S. 923).

III

We turn now to the question to what extent and by what procedure the parties could and did lawfully invoke the machinery prescribed by the Railway Labor Act in order to change the work rules in effect on the railroads at the expiration of the Award, rules that had been prescribed by the Board (including the crew consist rules prescribed by various local boards).

As already stated, these work rules were not immutable. Congress had enacted a compulsory arbitration measure of limited duration. The appropriateness of a limited duration for a compulsory arbitration measure, articulated by the Supreme Court 50 years ago in *Wilson* v. *New*, had been emphasized by the President and Congress.[18]

When were the parties to bargain about possible changes in the work rules that survived the Award? All parties agree that negotiation during the pendency of Award 282 was permissible, but the carriers say it was not obligatory. In our opinion, however, bargaining during the pendency of the Award 282 was not merely a matter for the whim of the parties but was to be governed by provisions of the Railway Labor Act, and these provisions remained in effect during the life of the Award for purposes of regulating the responsibilities of the parties to bargain concerning changes proposed to become effective *after* the expiration of the Award.

The principles and objectives underlying Public Law 88-108 reveal that Congress placed a high premium on the opportunity for continued collective bargaining during the life of the Award, in the hope and expectation, appar-

[18] *See* note 10 *supra*.

ently shared at that time by the parties themselves, that the unions and carriers would themselves work out a long range solution to these sensitive problems by the traditional devices of collective bargaining. This special statute served to give the Nation a temporary respite from the threat of a disastrous national rail strike by forbidding for two years any unilateral changes or resort to self-help and imposing instead interim rules to cover the situation. But as we have seen, both the statute and the Award expressly contemplated that the parties were free to alter or extend the rules fixed by Award.[19]

Public Law 88-108 established a procedure for formulating rules to govern for up to two years, in the absence of a negotiated pact. This did not displace the otherwise applicable provisions of the Railway Labor Act on the duty to bargain on changes proposed to become effective subsequent to the two-year period. President Kennedy in his message to Congress expressed the desire that the parties continue to confer on the ultimate resolution of their disputes.[20] A chief spokesman for the carriers, Mr. J. E. Wolfe,[21] assured the Senate Committee that the carriers understood that the Administration's bill "imposes a duty on the parties to attempt to settle their differences" and would "protect the public interest as a result of the establishment of these interim rules for a period of 2 years or less while the parties undertake, through collective bargaining, to bring about a more permanent solution of the problems." [22] We are aware that in the reshaping of the measure the duty to bargain on the work rules was not expressly spelled out, but the plan was surely retained. Indeed the preambles of both measures expressly

[19] Indeed, on the crew consist issue, Section III.A(1) of the Award remanded the dispute to local properties "for negotiation", and only if these further efforts to reach a settlement proved pointless were special boards of adjustment to be convened to fix the temporary rules.

[20] *See Message from the President, supra* note 7, at 6-8.

[21] Chairman of the National Railway Labor Conference, an organization whose members conduct about ninety percent of all railway operations in the United States.

[22] *Hearings on S.J.Res. 102, Before the Senate Comm. on Commerce,* 88th Cong., 1st Sess., ser. 24, at 375 (1963).

and unequivocally proclaimed the care taken to select a system which solved the immediate emergency "in a manner which preserves and prefers solutions reached through collective bargaining." Changes were made by the Congress—notably the substitution of an independent *ad hoc* board for the Interstate Commerce Commission as the arbiter for the dispute.[23] There was not a breath of a suggestion, however, that Congress intended to remove or even downgrade the policy that the parties themselves should confer in order to reach long-range solutions through collective bargaining and agreement.

The carriers contend that all this means only that the parties were free to bargain during the Award if they wished, or even that they were encouraged to do so, but that for the two-year period the special act repealed pro tanto and by implication the duty under the Railway Labor Act to confer on proposed rule changes. We disagree. In our view Public Law 88-108 was intended to work the minimum disruption of permanent railroad legislation and normal collective bargaining. The only disruption wrought, the only "repeal by implication", was that which necessarily accompanied the objective of staving off a cataclysmic strike by imposing a temporary settlement. We detect no glimmer of an intimation that the carriers were authorized to regard this as a two year hiatus in their obligation to bargain. Rather, we find much to militate against such a construction.

It is notable that the parties to this dispute had already agreed to submit their controversy to arbitration. They stumbled over procedural details. Congress viewed its role primarily as draftsmen of the specifics of an arbitration agreement to which the carriers and unions had already agreed in principle.[24] The statute in Section 4, the Award in Part IV, and the reports of both congres-

[23] The Supreme Court referred to this substitution as the only "significant change" from the Administration bill. Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., *supra* note 4, 382 U.S. at 432.

[24] *See* S. Rep. No. 459, 88th Cong., 1st Sess. 9 (1963); H.R. Rep. No. 713, 88th Cong., 1st Sess. 12-13 (1963); Brotherhood of Locomotive Firemen v. Chicago, B. & Q. R.R., 225 F. Supp. 11, 18 (D.D.C.) *aff'd*, 118 U.S.App.D.C. 100, 331 F. 2d 1020, *cert. denied*, 377 U.S. 918 (1964).

sional committees carefully specified that the effective duration of the Award was limited to no more than two years, unless extended by stipulation, in order to restrict the "scope and impact" of the statute.[25]

In essence then we have a mechanism tantamount to an arbitration agreement, albeit one drafted by Congress, that confers on the arbitrator the power to impose a settlement binding for up to two years. It becomes appropriate, then, to consider what would have been the rights and duties of the parties if they had themselves written the arbitration agreement. We are not concerned here with customary adjudicatory or grievance arbitration. Although so-called "legislative" arbitration agreements are relatively infrequent they are not unknown. Under such agreements, prospective rules and working conditions, instead of being determined by agreement of the union and employer, as is customary, are determined by an arbitrator to whom the function is delegated.[26] Such a determination by arbitration is equivalent to a determination by agreement insofar as the rights and duties of the parties concerning future modification are concerned. An arbitration award does not operate to "prevent the [parties] from seeking through negotiations under the procedures provided for by the Railway Labor Act or otherwise a new agreement . . . covering the rules. . ." [27]

Responsible conduct of the process of collective bargaining, for consideration of proposals to modify work rules established by an agreement or award of limited duration, embraces conference and consultation prior to the termination date. This is the way responsible businessmen deal with each other when they plan to continue a business relationship—for example, in negotiating on a contract or lease before its expiration date. This is the way responsible employers and unions implement the col-

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[25] S. Rep. No. 459, 88th Cong., 1st Sess. 10 (1963); *see* H.R. Rep. No. 713, 88th Cong., 1st Sess. 14-15 (1963).

[26] *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 30-47 (rev. ed. 1960).

[27] Sheehy, Ch.J., in Brotherhood of Railroad Trainmen v. St. Louis Sw. Ry., 220 F. Supp. 319, 325 (E.D. Tex. 1963).

lective bargaining process, and respond to calls for change. And this is the way railroads and railroad unions must respond under the mandate of the Railway Labor Act.

The purpose of a Section 6 notice is "to fix a procedure for the commencement of conferences between representatives of the two parties if changes are to be made in the contract." [28] No rigid form for these notices is defined in the statute.[29] All that is specified is thirty days written notice of a proposed change. The Act requires that within ten days a time and place for conference be set, and that the first conference be held within the 30-day period.

To recapitulate, the Railway Labor Act not only requires railway employers and unions to confer and bargain on work rules established by agreements or awards having a fixed expiration date when one party wants to change the rules, but permits the statutory machinery to be invoked *prior* to expiration in order to seek an agreement on changes to become effective on or after expiration.

If an agreement (or award) contains a fixed expiration date, rather than the common indefinite or automatic self-renewal term, then the notice must indicate a proposed effective date for changes that is not only at least thirty days after the notice, but also a time after the outstanding agreement or award expires. Nothing in the Railway Labor Act, or the scheme of Public Law 88-108, forbids service of a notice more than thirty days before the suggested rules would or could be effective, and nothing relieves the recipient from the duty to commence bargaining at that earlier stage.

The carriers seek to buttress their claim of pro tanto repeal by implication by arguing that it can hardly be supposed that Congress intended to permit the unions to ready themselves to strike on January 25, 1966. The only forecast of that day we can find in the legislative history is the assumption that it would be preceded by an agree-

[28] McMullans v. Kansas, O. & G. Ry., 229 F. 2d 50, 56 (10th Cir.), *cert. denied*, 351 U.S. 918 (1956).

[29] *See* Detroit & T.S.L.R.R. v. Brotherhood of Locomotive Firemen, 357 F. 2d 152, 153 (6th Cir. 1966).

ment of the parties. And that in turn, in our view, assumes that responsible collective bargaining would have been in train some time prior to the expiration date. If we turn from speculation about legislative intent to the realities of the Railway Labor Act, we are aware that the conferences triggered by Section 6 notices are typically the beginning and not the end of the statutory procedures. If conferences proposed by a Section 6 notice are unavailing, either party can invoke the services of the National Mediation Board. While negotiations continue or the Board has jurisdiction, no self-help is permitted. The parties are free to submit their controversy to arbitration. If none of these techniques resolves the matter, the President may convene an emergency board to investigate the dispute and report back on the issues. Only when all these steps have been exhausted are the parties permitted to act unilaterally. "For the procedures of the Act are purposefully long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." [30]

We do not say that the time of service of notice is completely irrelevant to the duties of the parties. It may be that a notice served the day after the Award would betoken bad faith to the point of vitiating its validity. We shall have occasion to point out that certain union notices were defective for analogous reasons. But the mere fact that the union notices were served prior to January 25, 1966, did not relieve the carriers of their duty to confer and bargain prior to January 25, 1966. We are not considering a case where the railroads, while conceding that the unions had a right to begin bargaining prior to the expiration date, responded that the particular notice came too early, perhaps on the ground that it did not permit enough experience under the existing rules to spawn realistic and informed bargaining. In the case before us the carriers flatly refused to engage in any statutory bargaining whatever prior to the expiration date. Except in the

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[30] Brotherhood of Railway Clerks v. Florida E.C. Ry., 384 U.S. 238, 246 (1966). See also Farmer, *Compulsory Arbitration—A Management Lawyer's View*, 51 VA. L. REV. 396, 401-02 (1965).

case of objectionable union proposals discussed below, the carriers before us must be held to have breached their statutory duty under the Railway Labor Act to confer and bargain on the merits of proposed changes in work rules. The decree of the District Court embodies a contrary declaration, and to that extent it is reversed.

We now consider the effect of our reversal of the District Court's ruling that the notices were not effective to require negotiation until after termination of the Award. As we have seen, conferences are but the first step in the chain of Railway Labor Act procedures. Once they have been frustrated, one side to the dispute can move to the next tier of procedures, and indeed in at least one series of cases involving parties before us the National Mediation Board has accepted jurisdiction of the controversy. The carriers have forsaken their right to insist on conferences by their refusal to respect effective Section 6 notices. The standard for good faith bargaining is quite liberal. Certainly it does not compel agreement. Judge Bryan, after the most careful analysis, formulated the frequently quoted standard that the—

> requirement of good faith bargaining is really a requirement of absence of bad faith. In order to show such lack of good faith it is necessary to establish facts from which it can be reasonably inferred that a party enters upon a course of bargaining and pursues it with the desire or intent not to enter into an agreement at all. *American Airlines, Inc.* v. *Air Line Pilots Ass'n,* 169 F.Supp. 777, 794 (S.D.N.Y. 1958).

Applying such a test, the carriers have breached their duty to enter negotiations in good faith, for a refusal to bargain on an erroneous premise of law is no excuse.[31]

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[31] *See, e.g.,* Order of Railroad Telegraphers v. Chicago & Nw. Ry., 362 U.S. 330 (1960). We do not consider attempts to obtain new work rules incompatible with those imposed by the Award or with the report of the Presidential Emergency Board reflective of bad faith on the part of the unions. Compare Pullman Co. v. Order of Railway Conductors, 316 F. 2d 556 (7th Cir.), *cert. denied,* 375 U.S. 820 (1963).

APPENDIX B

Extract From The Supplemental Opinion Of The Court Of Appeals For The District of Columbia Circuit, July 31, 1967, In Brotherhood of Railroad Trainmen v. *Akron & B. B. R. Co.* (385 F. 2d 581, *cert. den.*, 390 U.S. 923).

III *Applicability of Section 8 of the Norris-LaGuardia Act.*

A. Brotherhood of Railroad Trainmen (BRT)

Appellant Union seeks a ruling that even assuming the District Court had jurisdiction to issue a restraining order, the issuance of the order reflected error in this case.

We are clear that the District Court was correct in holding that it had jurisdiction to enjoin a violation of the Railway Labor Act, and that this jurisdiction was not negatived by or subject to Section 4 of the Norris-La Guardia Act. We affirmed that conclusion in No. 20316, and fully adhere to that ruling.

Although the District Court had jurisdiction to issue the restraining order we think it erred in doing so because—as we subsequently held in our May 12, 1967 ruling—the complainant carriers had failed to comply with their obligations under the Railway Labor Act. Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108 (1964), provides that a federal court shall not grant a restraining order or injunction in a labor dispute where the complainant "has failed to comply with any obligation imposed by law which is involved in the labor dispute in question."

The issuance of the restraining order was conditioned on the carriers' posting a bond to make good damages, not to exceed $10,000, sustained by any party wrongfully restrained. We think the Union, which had to obey the injunction or suffer penalties for contempt of court, is entitled to a ruling from this court that vacates an erroneous determination of the District Court, although of course we do not purport to describe what if anything the Union is entitled to collect on the bond.

The District Court erred in concluding that because it held, correctly, that the action was not subject to Section

4 of the Norris-La Guardia Act, which would have ousted the court of jurisdiction, it necessarily followed that the "clean hands" provision of Section 8 of the Norris-La Guardia Act was likewise wholly inapplicable. The Supreme Court has said, speaking through the Chief Justice, that "there must be an accommodation" of this Act with the Railway Labor Act. Brotherhood of Railroad Trainmen v. Chicago R. & Ind. R.R., 353 U.S. 30, 40 (1957). That principle of accommodation means that actions to enjoin violations of the Railway Labor Act may be maintained without regard to Section 4 of the Norris-La Guardia Act, and yet be subject to Section 8 of that Act. That is the conclusion of other courts which have considered the matter,[4] and we agree. The point is, simply, that Congress did contemplate actions to effectuate the Railway Labor Act by enjoining violations.[5] That purpose would be utterly defeated if the federal court actions involved were subject to Section 4 of the Norris-La Guardia Act, which had provisions for withholding injunctions in labor disputes reflecting entirely different objectives.

On the other hand a ruling that Section 8 of the Norris-La Guardia Act is applicable to actions to enjoin violations of the Railway Labor Act would not trammel but would rather further the effectuation of that Railway Labor Act, for it ensures compliance by complainant carrier or union which cannot seek an injunction until and unless it has discharged the obligations imposed by the Railway Labor Act.

It may be that in a particular case the District Court might conclude that the imperatives of the Railway Labor

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[4] *See* Rutland Ry. v. Brotherhood of Locomotive Eng'rs. 307 F. 2d 21, 37-40 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); Chicago, Rock I. & Pac. R.R. v. Switchmen's Union, 292 F. 2d 61, 64-66 (2d Cir. 1961), *cert. denied*, 370 U.S. 936 (1962); Elgin, J. & E. Ry. v. Brotherhood of Railroad Trainmen, 302 F. 2d 540, 544-45 (7th Cir.), *cert. denied*, 371 U.S. 823 (1962); Manning v. American Airlines, Inc., 221 F. Supp. 301, 304-06 (S.D. N.Y. 1963); *cf.* Brotherhood of Railroad Trainmen v. Toledo P. & W.R.R., 321 U.S. 50, 60-65 (1944); Brotherhood of Railway Clerks v. Florida E. C. Ry., 384 U.S. 238, 247 n.8 (1966); Brotherhood of Railroad Carmen v. Chicago & N.W. Ry., 354 F. 2d 786, 794-96 (8th Cir. 1965).

[5] Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937).

Act override Section 8—a statutory focusing so to speak of an equity approach whereby lack of clean hands may be overcome by a balancing of interests, particularly where it is the public interest involved. In a particular case the District Court might conclude that the question of the applicability of Section 8 was doubtful, would require time to explore, and that the restraining order should issue forthwith to avoid jeopardizing the Railway Labor Act. Such approaches would recognize that Section 8 of the Norris-La Guardia Act has some applicability, and is a legislative instruction that weighs heavier in the scale than the clean hands doctrine taken merely as a general equity maxim, yet is overborne by requirements of the Railway Labor Act. Here, however, the approach of the District Court was that Section 8 of the Norris-La Guardia Act was completely inapplicable and that was error. In saying that the restraining order was erroneously entered, however, we do not mean that would excuse a contemptuous violation.

We have said enough to demonstrate that the approach used by the District Court was erroneous. As we have decided, the complainants lack clean hands and the defendants were not threatening the violation. Therefore, we now rule that the District Court, taking all circumstances into consideration, should permit the Union to recover on the $10,000 bond if indeed it can establish that it sustained ascertainable damage from the issuance of the restraining order.

Office Supreme Court, U.S.
FILED
MAR 27 1970
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1099

BANGOR AND AROOSTOOK RAILROAD COMPANY, ET AL., *Petitioners,*

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Respondent.*

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Respondent.*

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

In the petition for writ of certiorari, we demonstrated (pp. 15-23) that the decision by the court below conflicts with decisions of this Court (as well as with decisions of other courts of appeals) in "accommodating" the Railway Labor Act and the Norris-LaGuardia Act by holding that some provisions of the Norris-LaGuardia Act (Section 8 in particular) apply to restraints against violations of the Railway Labor Act even though other provisions (Section 4 in particular) do not. This Court has consistently held that none of the provisions of the Norris-LaGuardia Act apply to injunctions enforcing the mandates of the Railway Labor Act.

A careful reading of the Brief in Opposition (pp. 7-13) will disclose that respondent does not fundamentally dispute our contention that the approach by the court below in "accommodating" the two Acts is not reconcilable with the

approach which has been taken by this Court. But respondent has attempted to create the impression that this Court has held that the Norris-LaGuardia Act is applicable to prevent injunctions against strikes over major disputes under the Railway Labor Act. As we show below, however, when a strike over a major dispute violates the Railway Labor Act—as did the strikes here—the Norris-LaGuardia Act is inapplicable and the strike may be enjoined.

Disputes over the interpretation of existing collective bargaining agreements in the railroad industry are known as "minor" disputes, while disputes over changes in those agreements are known as "major" disputes. Minor disputes not settled in conferences between the parties are subject to compulsory arbitration by adjustment boards under Section 3 of the Railway Labor Act (45 U.S.C. § 153), a strike over such a dispute therefore violates the mandates of the Act whether such strike occurs before or after arbitration, and Norris-LaGuardia is completely inapplicable to restraints against such illegal strikes. *E.g., Locomotive Engrs.* v. *L. & N. R. Co.*, 373 U.S. 33 (1963); *Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. 30 (1957). In major disputes, on the other hand, a settlement is not imposed on the parties by compulsory arbitration or otherwise; rather, they are required to exhaust procedures that "are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute" and may resort to "self-help" after those procedures are exhausted. *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966).

The requirements of the Railway Labor Act in regard to major disputes were succinctly stated by this Court, in *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378-379 (1969), as follows:

> "The Act provides a detailed framework to facilitate

the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10.

"Nowhere does the text of the Railway Labor Act specify what is to take place once these procedures have been exhausted without yielding resolution of the dispute. Implicit in the statutory scheme, however, is the ultimate right of the disputants to resort to self-help—'the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration.' *Florida E.C.R. Co.* v. *Railroad Trainmen,* 336 F. 2d 172, 181 (1964). We have consistently so held in a long line of decisions. *Railway Clerks* v. *Florida E.C.R. Co.,* 384 U.S. 238, 244 (1966); *Locomotive Engineers* v. *Baltimore & O. R. Co.,* 372 U.S. 284 (1963); *Railroad Telegraphers* v. *Chicago & N.W. R. Co.,* 362 U.S. 330 (1960); *Elgin, J. & E. R. Co.* v. *Burley,* 325 U.S. 711, 725 (1945)."

See, also, *Detroit and Toledo Shore Line R. Co.* v. *United Transportation Union,* 38 Law Week 4033, 4035 (1969). And, this Court also pointed out in the *Terminal Co.* case that the right to self-help implicit in the statutory scheme, once the procedures of the Act have been exhausted in a major dispute, includes strikes of the carriers involved in the dispute. 394 U.S., at 384.

Accordingly, a strike over a major dispute normally would not violate any of the mandates of the Railway Labor Act if the strike occurs after the procedures specified by the Act have been exhausted, but would violate the *status quo* requirements of the Act if the strike occurs before those procedures have been exhausted. Under the accommodation which we understand this Court to have made between the Railway Labor Act and the Norris-LaGuardia Act, therefore, Norris-LaGuardia could be applicable to a strike over a major dispute after the procedures of the Railway Labor Act have been exhausted, but could not apply to such a strike if those procedures have not been exhausted. This in fact is the manner in which the two Acts have been accommodated in regard to strikes over major disputes.

Telegraphers v. *Chicago & N.W. R. Co.,* 362 U.S. 330 (1960), and *Trainmen* v. *Toledo, P. & W. R. Co.,* 321 U.S. 50 (1944), referred to at pages 8, 9-11 and 11-12 of the Brief in Opposition, both involved strikes over major disputes after the procedures of the Railway Labor Act had been exhausted (see 362 U.S., at 349-351; 321 U.S., at 51-53). In *Telegraphers,* therefore, this Court distinguished *Trainmen* v. *Chicago, R. & I.R. Co.,* 353 U.S 30 (1957), which "held that a strike could be enjoined to prevent a plain violation of a basic command of the Railway Labor Act," on the ground that no violation of the Railway Labor Act was involved so that Norris-LaGuardia applied to prohibit an injunction against the strike. 362 U.S., at 338-339. In *Toledo,* no one contended that the strike violated the Rail-

way Labor Act or that Norris-LaGuardia was inapplicable. Rather, the carrier sought injunctive relief against violence pursuant to Section 7 of Norris-LaGuardia (29 U.S.C. § 107), and this Court simply held that the carrier had to comply with Section 8 (29 U.S.C. § 108) in order to obtain an injunction under Section 7, which it had not done. 321 U.S., at 54-66.

Unlike the court below in this case, this Court in its *Telegraphers* and *Toledo* decisions did not purport to accommodate the two Acts by picking and choosing among the various provisions of Norris-LaGuardia so as to find some applicable and some inapplicable. In *Toledo,* no one contended that any mandate of the Railway Labor Act had been violated and the Court refused to make an exception for Section 8 (321 U.S., at 65) in applying Norris-LaGuardia. In *Telegraphers,* the Court concluded that no mandate of the Railway Labor Act had been violated and distinguished the cases holding that Norris-LaGuardia does not apply to injunctions enforcing the mandates of the Railway Labor Act on that ground. Thus, the Court relied upon Section 4 of Norris-LaGuardia (29 U.S.C. § 104; 362 U.S., at 335), among others, while the court below in this case conceded that Section 4 is inapplicable under the circumstances involved here (Pet., App. B, at 32). We submit, therefore, that *Telegraphers* and *Toledo* afford no support to the decision below and, indeed, are consistent with and reinforce our analysis in the petition of the manner in which this Court has accommodated the Railway Labor and Norris-LaGuardia Acts.

While this Court has not directly decided whether Norris-LaGuardia applies so as to bar injunctive relief against a strike over a major dispute prior to the exhaustion of the procedures of the Railway Labor Act, the Court has made clear that a strike in such circumstances would violate the mandates of the Railway Labor Act (see pp. 2-4, *supra*)

and, in other circumstances, that Norris-LaGuardia does not deprive the courts of jurisdiction to compel compliance with the mandates of the Railway Labor Act (see Pet., at pp. 15-20). Thus, the lower courts have consistently recognized that a "strike called before completion of the major dispute procedures, like a change made by the carrier, is unlawful and may be enjoined pending compliance with the [Railway Labor] Act." *National Airlines, Inc.* v. *International Ass'n of M. & A. W.*, 416 F. 2d 998, 1002-1003 (5th Cir., 1969). See, *e.g.*, *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n, Internat'l*, 416 F. 2d 633, 636 (4th Cir., 1969), cert. den., 38 Law Week 3315 (1970); *Southern Ry. Co.* v. *Brotherhood of Locomotive Firemen, Etc.*, 337 F. 2d 127, 132-133 (D.C. Cir., 1964); *Manning* v. *American Airlines, Inc.*, 329 F. 2d 32, 34 (2d Cir., 1964), cert. den., 379 U.S. 817 (1964); *Railroad Yardmasters* v. *Pennsylvania Railroad Co.*, 224 F. 2d 226, 228 (3d Cir., 1955); *American Airlines, Inc.* v. *Air Line Pilots Ass'n, Inter.*, 169 F. Supp. 777, 783-789 (S.D.N.Y., 1958).[1]

In this case, of course, respondent had not exhausted the procedures of the Railway Labor Act in regard to its demand that the carriers restore the National Diesel Agreement to full force and effect upon the expiration of the Award by Arbitration Board No. 282. Indeed, respondent had not served the written notice required by Section 6 of the Railway Labor Act (45 U.S.C. § 156) in regard to that demand and, while respondent had served Section 6 notices of proposals to establish rules requiring the use of firemen on

[1] The lower court decisions cited in footnote 4, page 8, of the Brief in Opposition are not to the contrary. The *Missouri-Illinois* and *Pullman Company* cases involved major disputes in which the procedures of the Act had been exhausted, but recognized that a strike may be enjoined where those procedures have not been exhausted (322 F. 2d, at 796, 798; 316 F. 2d, at 564), and the Ninth Circuit in the *Butte* case noted that "[i]njunctive relief may be utilized by either party to vindicate the processes of the Railway Labor Act" (268 F. 2d, at 60). The *Chicago & N.W.* and *Rutland* cases involved minor, rather than major, disputes.

most locomotives, those proposals had not even been subject to mediation by the National Mediation Board when the strikes occurred.[2] The suggestion by respondent (Brief in Opposition, at 3) that it struck over petitioners' refusal to bargain about those proposals prior to the expiration of Award 282 is contrary to its contentions at the time of the strikes and is without warrant in the record. As the Court below noted in its Coercive Contempt Opinion (380 F. 2d, at 574), respondent "declared" at the time of the strikes that they were "solely in regard to a proposed fireman-training program unrelated to the manning question covered by the Arbitration Award." Respondent struck when Award 282 expired, not when the refusals to bargain occurred, and all the affidavits before the district court at the time the temporary restraining orders were entered were to the effect that the strike was in support of respondent's unlawful demand that the prior rules be restored to full force and effect when Award 282 expired.[3] Moreover, the court

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[2] The parties so stipulated in paragraph Q, Part I, of their April 30, 1966 Stipulation.

[3] In regard to the quotations from the Affidavit of James E. Wolfe (Brief in Opposition, at 3), we note that respondent has omitted the bulk of that Affidavit which demonstrated that respondent was demanding not merely bargaining but also restoration of the National Diesel Agreement of 1950 upon expiration of the Award. For example, Mr. Gilbert was quoted as voicing "a threat of a strike, if necessary, to restore a 1950 agreement requiring employment of firemen on all diesel locomotives, if an agreement with the carriers has not been reached on the issue by March 31" (Affidavit, at 11), and Mr. Deering was quoted as stating that the "railroads must either restore firemen to locomotives or face a strike on major lines" (Affidavit, at 13-14). Upon the basis of this and other information, Mr. Wolfe concluded that "the BLF&E upon the expiration of Arbitration Award 282 as to firemen (helpers) intends to strike the plaintiffs in an effort to force them to comply with the position of the BLF&E respecting the effect of the expiration of Award 282" (Affidavit, at 14). When the strikes actually occurred, the temporary restraining order was supplemented to enjoin specifically the continuance of the strikes upon the basis of affidavits asserting that the strikes were intended to require petitioners to restore the prior rules to full force and effect. Respondent did not file any affidavits prior to the issuance either of the temporary restraining order or of the supplement thereto.

below held in its Merits Opinion (385 F. 2d, at 597) that the effect of petitioners' refusal to bargain was to permit respondent to "move to the next tier of procedures" required by the Act—mediation by the National Mediation Board—rather than to permit respondent to strike.

Thus, the court below did not base its decision upon a holding that the strikes did not violate the Railway Labor Act; if it had so held, all of Norris-LaGuardia including Section 4 would have been applicable. Rather, as we have shown in the petition, the court below erred in concluding that some of the provisions of Norris-LaGuardia may apply to injunctions requiring compliance with the mandates of the Railway Labor Act, under its understanding of how the two Acts are to be "accommodated," and in holding that Section 8 of Norris-LaGuardia was applicable to the restraining orders issued in this case even though Section 4 of Norris-LaGuardia was inapplicable. We believe that we have demonstrated that that holding conflicts with decisions of this Court and of other courts of appeals [4] and involves an important issue of federal law which should be reviewed by this Court.

In regard to our contention that the Court should review the holding below that recovery of compensatory contempt damages is barred if the District Court was mistaken in its view that Section 8 of Norris-LaGuardia was completely inapplicable (Pet., at 23-27), respondent in effect contends that the decision by this Court in the *Mine Workers* case is dispositive (Brief in Opposition, at 13-16). We believe

[4] In footnote 15 on page 21 of the Petition, we pointed out that only the decision by the Second Circuit in the *Rutland* case, of those cited by the court below, lends support to its approach to the accommodation of the two Acts. That statement also applies to the decisions cited in the Brief in Opposition. We note that Mr. Justice (then Judge) Marshall dissented in the *Rutland* case (307 F. 2d, at 42-48), and would have enjoined both sides to comply with the Railway Labor Act including an injunction against the strike.

that we have demonstrated the contrary in the petition, and we continue to urge that this issue also is deserving of review by this Court.

Conclusion

For the reasons stated above and in the Petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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